

**HOA ASSESSMENT LIENS: EVERYTHING YOU NEED TO KNOW  
TO FIGURE OUT YOUR HEAD FROM YOUR ASSESSMENT LIEN**

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State Bar of Texas  
**34<sup>th</sup> ANNUAL**  
**ADVANCED REAL ESTATE LAW**  
July 12-14, 2012  
San Antonio

**CHAPTER 14**

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TABLE OF CONTENTS

I. INTRODUCTION ..... 1

II. COMMONLY USED TERMS AND DEFINITIONS..... 2

III. COMMON-INTEREST DEVELOPMENTS IN TEXAS ..... 8

IV. HOMEOWNERS ASSOCIATIONS IN TEXAS ..... 9

V. AUTHORITY OF TEXAS HOMEOWNERS ASSOCIATIONS TO LEVY ASSESSMENTS  
AGAINST LOTS OR UNITS..... 10

VI. OBLIGATION OF HOMEOWNERS TO PAY ASSESSMENTS ..... 10

VII. CREATION AND PERFECTION OF ASSESSMENT LIENS..... 10

VIII. SCOPE OF ASSESSMENT LIENS ..... 11

IX. PRIORITY OF ASSESSMENT LIENS ..... 11

X. FORECLOSURE OF ASSESSMENT LIENS ..... 12

    A. Judicial Foreclosure of Assessment Liens ..... 13

    B. Non-Judicial Foreclosure of Assessment Liens ..... 14

XI. PRE-FORECLOSURE DUE PROCESS PROCEDURES REQUIRED BY  
SUBDIVISION ASSOCIATIONS ..... 17

    A. Required Notice to Holders of Junior Deed of Trust Liens and Opportunity to Cure ..... 17

    B. Required Judicial Authorization Prior to Non-Judicial Foreclosure of a Subdivision  
    Association’s Assessment Lien ..... 17

XII. STATUTORY RESTRICTIONS ON THE RIGHT TO FORECLOSE ASSESSMENT LIENS ..... 20

XIII. TEXAS CONSTITUTIONAL HOMESTEAD PROTECTION..... 21

XIV. PROTECTION OF ACTIVE DUTY MILITARY SERVICEMEMBERS FROM FORECLOSURE..... 23

XV. POST-FORECLOSURE NOTICE REQUIREMENTS OF SUBDIVISION ASSOCIATIONS ..... 24

XVI. HOMEOWNER’S RIGHT OF REDEMPTION FOLLOWING A FORECLOSURE SALE..... 25

    A. Redemption of a Lot Foreclosed by a Subdivision Association..... 25

    B. Redemption of a Unit Foreclosed by a Condominium Association..... 29

XVII. PAYMENT OF DELINQUENT ASSESSMENTS AFTER RECORDING OF NOTICE OF  
ASSESSMENT LIEN ..... 29

XVIII. KICKING THE WHEELS ON THE NEW EXPEDITED JUDICIAL PROCEDURES REQUIRED  
FOR NON-JUDICIAL FORECLOSURE OF A SUBDIVISION ASSOCIATION’S ASSESSMENT  
LIEN: WHAT IT DOES AND DOESN’T DO..... 30

    A. The Expedited Judicial Proceeding Under Section 209.0092 Doesn’t Apply to a  
    Condominium Association..... 30

    B. Section 209.0092 Doesn’t Prohibit a Subdivision Association from Non-Judicially  
    Foreclosing Its Assessment Lien..... 30

- C. An Expedited Judicial Proceeding Under Section 209.0092 May Not Be Utilized in Lieu of a Traditional Lien Foreclosure Lawsuit..... 30
- D. Requiring Subdivision Associations to Obtain a Prior Court Order Through an Expedited Judicial Proceeding May Substantially Discourage Non-Judicial Foreclosures of Assessment Liens..... 31
- XIX. LOOKING BEYOND THE LEGAL ASPECTS OF ASSESSMENT LIEN FORECLOSURE..... 32
  - A. Portrait of the Typical Assessment Lien Foreclosure Scenario ..... 32
  - B. When should a Homeowners Association Foreclose an Assessment Lien?..... 33
  - C. Assessment Lien Foreclosure: Good Business or Poor Politics?..... 34
- SAMPLE NOTICE OF ASSESSMENT LIEN AGAINST PROPERTY FOR SUMS NOT PAID TO PROPERTY OWNERS ASSOCIATION ..... 37
- SAMPLE NOTICE OF PAYMENT TO PROPERTY OWNERS ASSOCIATION AND RELEASE OF NOTICE OF ASSESSMENT LIEN ..... 39

# HOA ASSESSMENT LIENS: EVERYTHING YOU NEED TO KNOW TO FIGURE OUT YOUR HEAD FROM YOUR ASSESSMENT LIEN

## I. INTRODUCTION

The fastest growing form of housing in the United States today is “Common-Interest Developments,” which include planned unit developments of single-family homes and condominiums. These Common-Interest Developments are almost always governed by an association of property owners, commonly referred to as a “Homeowners Association” or simply a “HOA,” which is a legal entity created by the real estate developer for the purpose of managing the development, maintaining development amenities and commonly-owned improvements, and enforcing development restrictions. In fact, the Community Associations Institute, a national organization for association-governed communities, estimates that as of 2011, there are more than 314,000 association-governed communities in the United States, which govern more than 25 million homes and 62.3 million residents, an increase of more than 3,000 percent from the same data compiled in 1970.<sup>1</sup>

Nowadays, Homeowners Associations often deliver services that were once the exclusive province of local governments, including trash pickup, street paving, and lighting, to name a few. This transfer, or privatization, of services has become commonplace as the demand for housing has outpaced the ability of many local governments to provide services. In addition, many Homeowners Associations also maintain swimming pools, tennis courts, playgrounds, and other amenities that most Americans cannot afford on their own, as well as provide security, social activities, clubhouses, walking trails, and more for the benefit of their homeowners and residents.

In order for a Homeowners Association to perform such obligations and provide such services, the Homeowners Association must have a source of income. The Declaration of Covenants, Conditions and Restrictions (“Declaration”) for an association-governed community generally requires each member of a Homeowners Association to pay assessments that are used to cover the expenses of the community at large. Such common expense related services include: installation and maintenance of landscaping in

common areas; maintenance and upkeep of community amenities; insurance for commonly-owned structures and areas; restrictive covenant enforcement; mailing costs for newsletters and other correspondence; employment of a management company or on-site manager; security personnel and gate maintenance; and any other item delineated in the governing documents for the Homeowners Association or agreed to by the board of directors for the Homeowners Association. The Declaration also commonly vests the Homeowners Association with tools to collect unpaid assessments, and in a lot of cases, the ability to foreclose a lien against a delinquent homeowner’s property for non-payment of assessments (commonly referred to as an “Assessment Lien”).

Assessments are the lifeblood of Homeowners Associations, without which they would be unable to fulfill their duties to their community. Inevitably, some lot or unit owners in every Homeowners Association will not pay levied assessments and, as a consequence, the Homeowners Association will be put in the unenviable position of having to engage in collection efforts against residents in its own community. While no Homeowners Association wants to be a debt collector, boards of directors have a duty to act in the best interest of their community and with due care in the management of the Homeowners Association’s affairs, which in most cases means that boards of directors have an obligation to make efforts to collect these unpaid assessments and, in appropriate circumstances, to foreclose its Assessment Lien against a delinquent homeowner.<sup>2</sup>

Perhaps no function of a Homeowners Association has attracted as much public media attention as the collection of Assessments and the exercise of foreclosure rights in connection with such collection efforts. In fact, in response to certain public outcry following the foreclosure of an Assessment Lien by a Homeowners Association in Harris County in 2001, the Texas Legislature enacted the Texas Residential Property Owners Protection Act (which is generally referred to as Chapter 209 of the Texas Property Code).<sup>3</sup> Chapter 209 of the Texas Property

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<sup>2</sup> As noted by the Texas Supreme Court in *Inwood North Homeowners' Association v. Harris*, “[t]he remedy of foreclosure is an inherent characteristic of the property right [and] is generally the only method by which other owners will not be forced to pay more than their fair share or be forced to accept reduced services.” 736 S.W.2d 632, 636 (Tex. 1987).

<sup>3</sup> Tex. Prop. Code § 209.001. The enacting legislation notes that it was enacted in honor of Wenonah Blevins, a woman whose home was foreclosed upon by a Homeowners Association in Harris County, and that the Texas Residential Property Owners Protection Act may be unofficially referred to as the “Wenonah Blevins Residential Property Owners Protection Act.”

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<sup>1</sup> <http://www.caionline.org/info/research/Pages/default.aspx>. In 1970, there were only 10,000 association-governed communities in the United States, which governed over 701,000 homes and 2.1 million residents. *Id.*

Code imposes certain due process requirements on Homeowners Associations that govern subdivision developments (commonly referred to as “Subdivision Associations”) before they can assess a fine, file a lawsuit, or seek reimbursement of attorneys fees against a Homeowner.<sup>4</sup>

Following two more highly publicized foreclosures, the 2011 the Texas Legislature enacted the most significant reforms to the laws governing Texas Homeowners Associations since the enactment of the Texas Uniform Condominium Act in 1993.<sup>5</sup> One of the most significant of the many new reforms enacted by the Texas Legislature is Section 209.0092 of the Texas Property Code, which now requires Subdivision Associations to obtain judicial authorization through an expedited judicial procedure prior to non-judicially foreclosing an assessment lien.

The purpose of this paper is to provide a basic explanation of the creation, scope and priority of HOA Assessment Liens, as well as the new regulations and procedures that govern the foreclosure of Assessment Liens and redemption of a lot or unit by its owner following foreclosure of a Homeowners Association’s Assessment Lien.

## **II. COMMONLY USED TERMS AND DEFINITIONS**

**Articles of Incorporation** is a defined term under the Texas Nonprofit Corporation Act and refers to the document required to be filed with the Texas Secretary of State’s office to form a nonprofit corporation, and includes any restated and amended Articles of Incorporation.<sup>6</sup> Such term is synonymous with the term “Certificate of Formation” under the Texas Nonprofit Corporation Law.<sup>7</sup>

**Assessment** is a commonly-used term of art that refers to a monetary charge assessed by a Homeowners Association against a Homeowner pursuant to its Declaration or Bylaws to fund the operation of the Homeowners Association and management of the community or other obligation specified by such Governing Documents.<sup>8</sup> Such term includes regular Assessments, special Assessments,

individual Assessments, or other types of charges specified by a Homeowners Association’s Governing Documents or Texas law. For purposes of a Condominium Association’s Assessment Lien, the term “Assessment” is defined by the Texas Uniform Condominium Act and includes regular Assessments, special Assessments, dues, fees, charges, interest, late fees, fines, collection costs, attorneys fees, and any other amount due a Condominium Association by a Unit Owner.<sup>9</sup>

**Assessment Lien** is a commonly-used term of art that refers to a contractual lien created and reserved in a Declaration (and/or by the Texas Uniform Condominium Act) in favor of a Homeowners Association to secure payment of Assessments.<sup>10</sup>

**Association-Governed Community** is a generic term of art that refers generally to any Subdivision Development or Condominium Development governed by an association of property owners, including single-family Subdivision Developments, Condominium Developments, and other types of planned-unit developments.

**Association Rules** is a commonly-used term of art that refers to rules adopted and amended from time to time by the Board of Directors of a Homeowners Association pursuant to its authority to do so under its applicable Declaration. Such rules are sometimes also called “rules and regulations” in a Declaration.

**Board of Directors** is a defined term under the Texas Nonprofit Corporation Law and means the group of persons vested with the management of the affairs of a Nonprofit Corporation HOA, regardless of the name used to designate such group.<sup>11</sup>

**Bylaws** is a defined term under the Texas Nonprofit Corporation Law and means the rules adopted to regulate or manage a Nonprofit Corporation HOA, regardless of the name used to designate such rules.<sup>12</sup>

**Certificate of Formation** is a defined term under the Texas Business Organization Code and refers to the document required to be filed with the Texas Secretary of State’s office to form a nonprofit corporation, and includes any restated and amended

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<sup>4</sup> Tex. Prop. Code §§ 209.006-009.

<sup>5</sup> Most of the reforms consist of adding new provisions to or modifying existing provisions of Chapter 209 of the Texas Property Code, which applies only to Subdivision Associations. Accordingly, the majority of these new laws affect primarily only Subdivision Associations and not Condominium Associations.

<sup>6</sup> Tex. Rev. Civ. Stat. Ann. art. 1396-1.02(A)(4).

<sup>7</sup> Tex. Bus. Org. Code § 1.002(6).

<sup>8</sup> See generally, Tex. Prop. Code § 209.002(1).

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<sup>9</sup> Tex. Prop. Code § 82.113(a).

<sup>10</sup> See Tex. Prop. Code § 82.113.

<sup>11</sup> Tex. Bus. Org. Code § 22.001(1); see also, Tex. Prop. Code § 82.003(4).

<sup>12</sup> Tex. Bus. Org. Code § 22.001(2).

Certificates of Formation.<sup>13</sup> Such term is synonymous with the term “Articles of Incorporation” under the former Texas Nonprofit Corporation Act.<sup>14</sup>

**Chapter 209 of the Texas Property Code**, more commonly referred to as simply “**Chapter 209**” refers to the Texas law that imposes certain due process requirements on a Subdivision Association before it may suspend a Lot Owner’s right to use a Common Area, initiate judicial proceedings to enforce Restrictive Covenants against a Lot Owner, charge a Lot Owner for property damage, assess a fine against a Lot Owner for violation of a Restrictive Covenant, or charge a Lot Owner for attorneys fees incurred by the Subdivision Association, as well as imposes certain requisite procedures on a Subdivision Association prior to and following foreclosure of an Assessment Lien.<sup>15</sup> Chapter 209 also requires a Subdivision Association to obtain a court order authorizing the foreclosure of its Assessment Lien through an expedited judicial proceeding (referred to as an “Expedited Non-Judicial Foreclosure Proceeding”) before it may foreclose its Assessment Lien by non-judicial foreclosure procedures.<sup>16</sup>

**Common Area** is a commonly-used term of art that refers to real property in a Subdivision Development that is owned by the Subdivision Association for the benefit of the Lot Owners in such Subdivision Development.

**Common Elements** is a defined term under the Texas Uniform Condominium Act that refers to all portions of a Condominium Development other than the Units and includes both General Common Elements and Limited Common Elements.<sup>17</sup>

**Common Expenses** is a defined term under the Texas Uniform Condominium Act that refers to expenditures made by or financial liabilities of the Condominium Association, together with any allocations to reserves.<sup>18</sup>

**Common Expense Liability** is a defined term under the Texas Uniform Condominium Act that refers to

the liability for Common Expenses allocated to each Unit in a Condominium Development.<sup>19</sup>

**Common-Interest Development** is a commonly-used term of art that refers to a real estate development in which a certain defined group of property owners have common-ownership interests, such as a Condominium Development, or are members of a Homeowners Association that owns property for the benefit of such property owners. The term includes Subdivision Developments, Condominium Developments, and any other type of planned-unit development.

**Community Association** is a defined term under Chapter 206 of the Texas Property Code that refers to an incorporated association created to enforce Restrictive Covenants.<sup>20</sup> Such term is commonly used synonymously with the term “Homeowners Association” or “Property Owners Association.”

**Community Associations Institute**, also typically called “CAI,” is a national educational membership organization composed of various interest groups serving the Association-Governed Community industry, with local chapters throughout the nation, including Texas.

**Condominium Association** (called simply an “Association” under the Texas Uniform Condominium Act) is a defined term under the Texas Uniform Condominium Act that refers to a Homeowners Association, organized as a for-profit or nonprofit corporation, whose membership consists of the owners of all of the Units in a Condominium Development.

**Condominium Declaration** (called simply a “Declaration” under the Texas Uniform Condominium Act) is a defined term under the Texas Uniform Condominium Act that refers to the recorded instrument, however denominated, that creates a Condominium Development, and any recorded amendment to such instrument.<sup>21</sup>

**Condominium Development** (called simply a “Condominium” under the Texas Uniform Condominium Act) is a defined term under the Texas

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<sup>13</sup> Tex. Bus. Org. Code § 1.002(6).

<sup>14</sup> Tex. Rev. Civ. Stat. Ann. art. 1396-1.02(A)(4).

<sup>15</sup> See Chapter 209 of the Texas Property Code.

<sup>16</sup> Tex. Prop. Code § 209.0092.

<sup>17</sup> Tex. Prop. Code § 82.003(5).

<sup>18</sup> Tex. Prop. Code § 82.003(7).

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<sup>19</sup> Tex. Prop. Code § 82.003(6).

<sup>20</sup> Tex. Prop. Code § 206.001(1).

<sup>21</sup> Tex. Prop. Code § 82.003(11). The Texas Condominium Act defines the term “Declaration” as the instrument that establishes property under a condominium regime. Tex. Prop. Code § 81.002(5).

Uniform Condominium Act that refers to a form of real property ownership created by statute in which portions of a single Lot or tract of land is designated for separate ownership or occupancy (called Units), and the remaining portions of which are designated for common ownership or occupancy solely by the owners of the separately-owned portions (called Common Elements).<sup>22</sup> Such term is synonymous with the term “Condominium Regime.”

**Declarant** is a defined term under the Texas Uniform Condominium Act that refers to a person, or group of persons, acting in concert: (1) who, as part of a common promotional plan, offers to dispose of the person's interest in a Unit not previously disposed of; or (2) reserves or succeeds to any Special Declarant Right.<sup>23</sup> Such term is also commonly used in a Declaration for a Common-Interest Community to refer to the real estate developer who is recording such Declaration.

**Declaration** is a commonly-used term of art that refers to the written instrument recorded in the Official Public Records of a county, commonly entitled “Declaration of Covenants, Conditions, and Restrictions,” which imposes contractual obligations (known as “Restrictive Covenants”) upon certain delineated real property that become binding upon any subsequent owner of such real property.<sup>24</sup> Such contractual obligations typically make the owners of such real property mandatory members of a Homeowners Association and impose certain restrictions upon such owners’ use of their property. A “Declaration” is also sometimes synonymously referred to as “CCRs,” “land-use restrictions,” “Restrictive Covenants,” “Deed Restrictions,” or “Dedicator Instrument.”

**Dedicator Instrument** is a defined term under Chapter 202 of the Texas Property Code and refers to each Governing Document covering the

establishment, maintenance, and operation of a Subdivision Development, Condominium Development, or any other similarly-planned development. The term includes a Declaration or similar instrument subjecting real property to Restrictive Covenants, Bylaws, or similar instruments governing the administration or operation of a Homeowners Association.<sup>25</sup> Such term is synonymous with the term “Governing Documents.”

**Development Period** is a defined term under Chapter 209 of the Texas Property Code that refers to a period of time stated in a Declaration during which a Declarant reserves: (1) a right to facilitate the development, construction, and marketing of the Subdivision Development; and (2) a right to direct the size, shape, and composition of the Subdivision Development.<sup>26</sup>

**Director** is a defined term under the Texas Business Organizations Code that refers to an individual who serves on the Board of Directors of a Nonprofit Corporation HOA.<sup>27</sup>

**Expedited Non-Judicial Foreclosure Application** is a term of art that refers to a verified application filed by a Subdivision Association in an Expedited Non-Judicial Foreclosure Proceeding in order to obtain a requisite court order authorizing it to non-judicially foreclose its Assessment Lien.<sup>28</sup>

**Expedited Non-Judicial Foreclosure Proceeding** is a term of art that refers to an expedited judicial proceeding governed by Texas Rules of Civil Procedure 735 and 736 through which a Subdivision Association may obtain a requisite court order authorizing it to non-judicially foreclose its Assessment Lien.<sup>29</sup>

**General Common Elements** is a defined term under the Texas Uniform Condominium Act that refers to all portions of the Common Elements in a Condominium Development that are not designated as Limited Common Elements.<sup>30</sup>

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<sup>22</sup> Tex. Prop. Code § 82.003(8). The Texas Condominium Act defines the term “condominium” as a form of real property ownership that combines separate ownership of individual apartments or units with common ownership of other elements. Tex. Prop. Code § 81.002(3).

<sup>23</sup> Tex. Prop. Code § 82.003(10). Although the term “declarant” is used within Chapter 209 of the Texas Property to define a Subdivision Association’s “Development Period,” Chapter 209 itself does not define such term. *See, e.g.*, Tex. Prop. Code § 209.0041(a) (“In this section, ‘development period’ means a period stated in a declaration during which a declarant reserves: (1) a right to facilitate the development, construction, and marketing of the subdivision; and (2) a right to direct the size, shape, and composition of the subdivision.”).

<sup>24</sup> *See generally*, Tex. Prop. Code § 209.002(3).

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<sup>25</sup> Tex. Prop. Code § 202.001(1).

<sup>26</sup> Tex. Prop. Code § 209.0041(a).

<sup>27</sup> Tex. Bus. Org. Code § 1.002(16).

<sup>28</sup> Tex. R. Civ. P. 735, 736.

<sup>29</sup> Tex. Prop. Code § 209.0092; Tex. R. Civ. P. 735, 736.

<sup>30</sup> Tex. Prop. Code § 82.003(14). The Texas Condominium Act defines the term “General Common Elements” as the property that is part of a Condominium Regime other than property that is part of or belongs to an Apartment in the regime, including: (A) land on which the building is erected; (B) foundations, bearing walls

**Governing Documents** is a commonly-used term of art that refers to each governing instrument covering the establishment, maintenance, and operation of a Subdivision Development, Condominium Development, or any other similarly-planned development. The term includes: (1) a Declaration or Dedicatory Instrument subjecting real property to Restrictive Covenants; (2) Articles of Incorporation; (3) Bylaws; (4) Association Rules; and (5) any other similar instruments governing the administration or operation of a Homeowners Association. “Governing Documents” is also a defined term under the Texas Business Organizations Code and means the Articles of Incorporation (or Certificate of Formation) for a Nonprofit Corporation HOA and all other documents or agreements adopted by the Nonprofit Corporation HOA under the Business Organizations Code to govern the formation or the internal affairs of the Nonprofit Corporation HOA, including its Bylaws.<sup>31</sup>

**HOA** is the commonly-used abbreviation for “Homeowners Association.”

**Homeowners Association** is a commonly-used term of art that refers to an incorporated or unincorporated association whose members consist primarily of the owners of the real property in a Common-Interest Development subject to a Declaration and through which such owners, or a Board of Directors or similar governing body, manage or regulate such Common Interest Development. Such term is often considered synonymous with the terms “Property Owners’ Association,” “Condominium Association,” “Subdivision Association,” and/or “Community Association.”<sup>32</sup>

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and columns, roofs, halls, lobbies, stairways, and all entrance, exit, and communication ways; (C) basements, flat roofs, yards, and gardens, except as otherwise provided; (D) premises for the lodging of janitors or persons in charge of the building, except as otherwise provided; (E) compartments or installation of central services such as power, light, gas, water, refrigeration, central heat and air, reservoirs, water tanks and pumps, and swimming pools; and (F) elevators and elevator shafts, garbage incinerators, and all other devices and installations generally existing for common use. Tex. Prop. Code § 81.002(6).

<sup>31</sup> Tex. Bus. Org. Code § 1.003(36).

<sup>32</sup> For simplicity, this paper refers to all residential associations of property owners as “Homeowners Associations” when no distinction is to be made between Homeowners Associations overseeing residential Subdivision Developments and Condominium Developments. However, where it is necessary to distinguish between these two types of property owners associations, this book refers to Homeowners Associations overseeing residential Condominium Developments as “Condominium Associations” and Homeowners Associations overseeing residential Subdivision Developments or similarly-planned developments in which all of the land has been divided into two or more parts as “Subdivision Associations.”

**Homestead** is defined term under the Texas Constitution and Chapter 41 of the Texas Property Code that refers to real property owned and utilized by a Texas citizen as his or her residence, which is afforded certain protection from foreclosure by creditors under the Texas Constitution and Texas Property Code.<sup>33</sup>

**Individual Assessment** is a commonly-used term of art that refers to an Assessment levied against a specific individual Unit or Lot.

**Judicial Foreclosure** is a commonly-used term of art that refers to a foreclosure conducted by a county sheriff or constable upon entry of judgment by a court of law that orders certain real property subject to a lien be sold to satisfy the debt secured by such lien.

**Limited Common Element** is a defined term under the Texas Uniform Condominium Act that refers to the portion of the Common Elements in a Condominium Development allocated by the Condominium Declaration or by operation of Section 82.052 of the Texas Uniform Condominium Act for the exclusive use of one or more, but less than all, of the Units.<sup>34</sup> In plain English, Limited Common Elements are those portions of a Condominium Development that are not part of an Owner’s separate Unit, but which are used exclusively by one or only a few of the Units Owners. The most illustrative example of a Limited Common Element is a balcony on the outside of an apartment-styled Condominium Development, which is accessible by only a single Unit and is intended to be used by only the owner of such Unit.

**Lot** is a commonly-used term of art that refers to a parcel of land within a Subdivision Development created by the recording of a Subdivision Plat that is owned in fee simple by its owner.

**Non-Judicial Foreclosure** is a commonly-used term of art that refers to a foreclosure of a contractual lien against real property pursuant to the provisions of Chapter 51 of the Texas Property Code.

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<sup>33</sup> Tex. Const. art. XVI, § 50; Tex. Prop. Code § 41.002.

<sup>34</sup> Tex. Prop. Code § 82.003(17). The Texas Condominium Act defines the term “Limited Common Elements” as a portion of the Common Elements allocated by unanimous agreement of a Council of Owners for the use of one or more, but less than all, of the Apartments, such as special corridors, stairways and elevators, sanitary services common to the Apartments of a particular floor, and similar areas or facilities. Tex. Prop. Code § 81.002(7).

**Nonprofit Corporation** is a defined term under the Texas Nonprofit Corporation Law that refers to a corporation, no part of the income of which is distributable to a Member, Director, or Officer of such corporation.<sup>35</sup>

**Notice of Assessment Lien** is a commonly-used term of art that refers to a document filed by a Homeowners Association in the Official Public Records of the county in which it is located to validly perfect an Assessment Lien and/or to put third-parties, including any potential purchasers or title companies, on notice that there are unpaid Assessments currently outstanding for a particular Lot or Unit that are secured by an Assessment Lien on such Lot or Unit.

**Officer** is a defined term under the Texas Business Organizations Code and means an individual elected, appointed, or designated as an Officer of a Nonprofit Corporation HOA under its Governing Documents.<sup>36</sup>

**Official Public Records** is a defined term under the Texas Local Government Code that refers to the collection of recorded deeds, mortgages, and other instruments that are required or permitted by law to be recorded or kept by the clerk of each county in Texas.<sup>37</sup>

**Official Public Records of Real Property** (formerly known as the Official Public Records of Deed Records) is a defined term under the Texas Local Government Code that refers to the class of Official Public Records related to real property.<sup>38</sup> Such records have previously been referred to under Texas law as “Property Records” or “Deed Records,” and some Texas statutes still use such terms even today.

**Planned Unit Development** is a commonly-used term of art used by lenders, financial institutions, and title companies to primarily describe developments with individually-owned Lots and Common Areas owned by a Homeowners Association and other similar real estate developments other than Condominium Developments. Such term is commonly regarded as synonymous with “Subdivision Development.”

**POA** is a commonly used acronym for Property Owners’ Association.

**PUD** is a commonly used acronym for a Planned Unit Development.

**Property Owners Associations** is a defined term under Chapter 202 of the Texas Property Code that refers to an incorporated or unincorporated association owned by, or whose members consist primarily of, the owners of the property covered by a Declaration or other Dedicatory Instrument, and through which the property owners, or the Board of Directors or similar governing body, manage or regulate the Subdivision Development, Condominium Development, or other similarly-planned development.<sup>39</sup> Such term is also a commonly used term of art that refers generically to any type of association established by a Declaration and whose membership consists exclusively of the owners of property subject to such Declaration.

**Redemption Period** is a commonly-used term of art that refers to the specified time period following foreclosure of a Homeowners Association’s Assessment Lien during which the owner of the real property that was foreclosed upon may redeem (or reacquire) his or her property from the entity or person that purchased it at the foreclosure sale.<sup>40</sup>

**Regular Assessment** is a commonly-used term of art that refers to an Assessment, charge, fee, or dues that each Lot Owner or Unit Owner is required to pay to the Homeowners Association on a regular basis and that are to be used by the Homeowners Association for the benefit of the Subdivision or Condominium Development in accordance with its Declaration.<sup>41</sup>

**Restrictive Covenant** is a commonly-used term of art that refers to any covenant, condition, or restriction contained in a Declaration or other Dedicatory Instrument, whether mandatory, prohibitive, permissive, or administrative, that is binding upon real property and governs the ownership or use of such real property.<sup>42</sup> Other common terms of art that are synonymous with Restrictive Covenant include “Deed Restrictions,” “Restrictions,” “Covenants,” and “Land-Use Restrictions.”

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<sup>35</sup> Tex. Bus. Org. Code § 22.001(5).

<sup>36</sup> Tex. Bus. Org. Code § 1.002(61).

<sup>37</sup> Tex. Loc. Gov’t Code §§ 192.001, 193.001, 193.008. The county clerk is required to certify on all recorded documents the specific location in the Official Public Records at which the instrument is recorded.

<sup>38</sup> Tex. Loc. Gov’t Code § 193.008.

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<sup>39</sup> Tex. Prop. Code § 202.001(2).

<sup>40</sup> Tex. Prop. Code § 82.113; Tex. Prop. Code § 209.011.

<sup>41</sup> See generally, Tex. Prop. Code § 204.001(3).

<sup>42</sup> See generally, Tex. Prop. Code § 202.001(4).

**Special Assessment** is a commonly-used term of art that refers to an Assessment, other than a regular Assessment, that is levied in a uniform manner against all Homeowners in a Homeowners Association for a specific designated purpose and in accordance with the procedures set forth by a Homeowners Association's Governing Documents.<sup>43</sup>

**Special Meeting** is a commonly-used term of art that refers to a meeting of a Homeowners Association's Board of Directors or Membership that is called for a specific purpose and at which only such items that were identified in the notice of such meeting may be considered and voted upon.

**Subdivision Association** is a commonly-used term of art that refers to a Homeowners Association that governs a Subdivision Development, as opposed to a Condominium Development, and whose Membership consists of Lot Owners in such Subdivision Development.

**Subdivision Development** is a commonly-used term of art that refers to all land encompassed within one or more recorded maps or plats of land that is divided into two or more parts (called "Lots") and which is collectively subject to a Declaration or other Dedicatory Instrument imposing Restrictive Covenants upon all such land, excluding streets and public areas.

**Texas Condominium Act** refers to the Texas law that governs Condominium Developments established prior to January 1, 1994.<sup>44</sup>

**Texas Nonprofit Corporation Act** refers to the Texas law that governed Texas nonprofit corporations incorporated prior to January 1, 2006, which expired on December 31, 2009.<sup>45</sup>

**Texas Nonprofit Corporation Law** refers to the Texas law governing Texas nonprofit corporations incorporated on or after January 1, 2006, and which superseded the Texas Nonprofit Corporation Act and, as of January 1, 2010, now governs all Texas Nonprofit Corporations, regardless of when incorporated.<sup>46</sup>

**Texas Residential Property Owners Protection Act**, also commonly referred to as Chapter 209 of the Texas Property Code or simply "Chapter 209," refers to the Texas law that imposes certain due process requirements on a Subdivision Association before it may suspend a Lot Owner's right to use a Common Area, initiate judicial proceedings to enforce Restrictive Covenants against a Lot Owner, charge a Lot Owner for property damage, assess a fine against a Lot Owner for violation of a Restrictive Covenant, or charge a Lot Owner for attorneys fees incurred by the Subdivision Association, as well as imposes certain requisite procedures on a Subdivision Association prior to and following foreclosure of an Assessment Lien.<sup>47</sup> Chapter 209 also requires a Subdivision Association to obtain a court order authorizing the foreclosure of its Assessment Lien through an expedited judicial proceeding (referred to as an "Expedited Non-Judicial Foreclosure Proceeding") before it may foreclose its Assessment Lien by non-judicial foreclosure procedures.<sup>48</sup>

**Texas Uniform Condominium Act** refers to the Texas law that governs Condominium Developments established on or after January 1, 1994, as well as Condominium Developments created prior to January 1, 1994, whose Condominium Declaration states that Chapter 82 of the Texas Property Code shall apply to the Condominium Development.<sup>49</sup>

**Townhouse**, also sometimes referred to as **Townhome**, is a commonly-used term of art that generally refers to row houses or dwellings that are attached side-by-side. A Townhouse is not a recognized form of real estate ownership under Texas law, and although most communities described as Townhouses are Subdivision Developments, they may be either a Subdivision or Condominium Development.

**Unit** is a defined term under the Texas Uniform Condominium Act that refers to a physical portion of the Condominium Development designated for separate ownership or occupancy, the boundaries of which are described by the Condominium Declaration.<sup>50</sup>

**Unit Owner** is a defined term under the Texas Uniform Condominium Act that refers to a Declarant

<sup>43</sup> See generally, Tex. Prop. Code § 204.001(4).

<sup>44</sup> See Chapter 81 of the Texas Property Code.

<sup>45</sup> See Article 1396 of the Texas Revised Civil Statutes.

<sup>46</sup> See Chapter 22 of the Texas Business Organizations Code.

<sup>47</sup> See Chapter 209 of the Texas Property Code.

<sup>48</sup> Tex. Prop. Code § 209.0092.

<sup>49</sup> See Chapter 82 of the Texas Property Code.

<sup>50</sup> Tex. Prop. Code § 82.003(23).

or other person who owns a Unit, or a lessee of a Unit in a Leasehold Condominium whose lease expires simultaneously with any lease the expiration or termination of which will remove the Unit from the Condominium Development, but does not include a person having an interest in a Unit solely as security for an obligation, such as a mortgagee.<sup>51</sup>

### **III. COMMON-INTEREST DEVELOPMENTS IN TEXAS**

There are two basic forms of Common-Interest Developments under Texas law: “Subdivision Developments” and “Condominium Developments.” These types of developments are distinguished by the type of real property ownership contemplated by the development.

Subdivision Developments are Common-Interest Developments that consist of parcels of land, usually called “Lots,” that are subject to separate conveyance and exclusive ownership. In most cases, Subdivision Developments arise where a large tract of land is owned by a real estate developer who divides the tract into separate, individually-owned Lots by filing a subdivision plat with the local governmental entity. The subdivision plat must be approved by such local government entity and will typically divide the parcel of land into: (1) residential Lots that are to be separately owned by homeowners; (2) “Common Areas” that are to be owned by a Homeowners Association made up of and for the benefit of the Lot owners; and (3) streets to provide access by the owners to their Lots. The key distinguishing element of this type of development is that each Lot is a separate, exclusively-owned parcel of real property and the Common Areas of land are owned by the Homeowners Association for the benefit of the Lot owners.

Condominium Developments are a unique form of real property ownership created by statutory law. A Condominium Development differs significantly from a Subdivision Development in that a Condominium Development involves a single tract or Lot, specific portions of which are designated for separate and exclusive ownership, called “Units,” and the remaining portions of which are owned in common by the owners of the separately-owned Units, collectively called “Common Elements.” The most common example of a Condominium Development is an apartment building, where the interior of the individual apartments are exclusively owned by each respective Unit Owner, but the Lot on which the building is located, the exterior of the building, and all hallways, stairs and elevators are owned by all of the

Unit Owners in common. Condominium Developments, however, come in all shapes and sizes and can include developments with detached, single-family homes that look and feel like traditional Subdivision Developments. The key distinguishing element of this type of development is that it consists of only one Lot or tract, which contains specific designated portions that are separately- and exclusively-owned Units, and other portions that are owned in common by all of the Unit Owners. Unlike Subdivision Developments, the Common Elements in Condominium Developments are owned by the Unit Owners in common with each other, not by the Homeowners Association.<sup>52</sup>

The laws applicable to Subdivision and Condominium Developments differ significantly, and for this reason, it is important to determine what type of development a particular Common-Interest Development is. Unfortunately, it is not always very easy to determine what kind of development a particular community is by looking solely at its physical characteristics. To add to the confusion, Subdivision and Condominium Developments can go by many different common descriptions or monikers, depending on the perception the developer is trying to create, including master-planned communities, planned unit developments, townhome communities, garden-home communities, estate communities, ranch communities, etc. And, Condominium Developments don’t always call themselves condominiums or include the term “condominium” in the name of the community. The easiest way to determine whether a particular development is a Subdivision Development or a Condominium Development is to look at the legal description of the real property that is separately owned, which can be found within an owner’s deed. If the legal description for the separately-owned real property identifies it as a specific “Lot” of a platted subdivision or a tract of land described by metes and bounds, then it is a Subdivision Development. On the other hand, if the legal description of the separately-owned real property describes it as a “Unit” or “Apartment,” along with a proportionate ownership share or percentage in additional portions of a Lot or tract of land, then it is a Condominium Development.

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<sup>51</sup> Tex. Prop. Code § 82.003(24).

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<sup>52</sup> See Tex. Prop. Code § 82.003(a)(8). Real property constitutes a Condominium Development only if one or more of the Common Elements are directly owned in undivided interests by the Unit Owners. Tex. Prop. Code § 82.003(a)(8). If all of the Common Elements are owned by a legal entity separate from the Unit Owners, even if the separate legal entity is owned by the Unit Owners (such as a Homeowners Association), then the real property is not a Condominium Development. Tex. Prop. Code § 82.003(a)(8).

**IV. HOMEOWNERS ASSOCIATIONS IN TEXAS**

A Homeowners Association is the organization made up of property owners in a residential Common-Interest Development, which is generally vested with the management and maintenance of the community and its amenities and commonly-owned property. The term “Homeowners Association,” or “HOA,” is commonly used interchangeably to refer to associations of property owners in both residential Subdivision Developments and Condominium Developments in Texas. However, because there are many laws that apply differently to Subdivision and Condominium Developments, it is important to be specific in the terms used to refer to a Homeowners Association for a residential Subdivision Development versus a Homeowners Association for a residential Condominium Development. A “Condominium Association” is the proper term used in Texas to refer to a Homeowners Association that administers a residential Condominium Development. Most people, however, still generally refer to Homeowner Associations governing residential Condominium Developments as “HOAs.” While it is not necessarily inaccurate to refer to a Condominium Association as an HOA, it would be incorrect to refer to a Homeowners Association overseeing a residential Subdivision Development as a Condominium Association.

Unlike Condominium Associations, there is no single term designated under Texas law for Homeowners Associations overseeing residential Subdivision Developments. The Texas Property Code uses the term “Property Owners’ Associations” in Chapter 202 to describe any incorporated or unincorporated association owned by, or whose members consist primarily of, the owners of property covered by a dedicatory instrument through which the property owners or a board of directors (or similar governing body) manage or regulate a residential Subdivision Development, Condominium Development, or similar planned development. The Texas Property Code, however, uses the term “Community Association” in Chapter 206 instead of “Property Owners Association” to describe any incorporated Homeowners Association created to enforce restrictive covenants, which would necessarily include Homeowners Associations overseeing both residential Subdivision and Condominium Developments.<sup>53</sup> To add to the inconsistencies, the Texas Property Code uses the term “Property Owners’ Association” again in Chapter 209, but defines such term as any incorporated or unincorporated

association whose membership primarily consists of owners of Lots in a residential Subdivision that is designated as the representative of such Lot owners and manages or regulates such residential Subdivision Development for the benefit of such Lot owners. Thus, by definition the term “Property Owners Association” under Chapter 209 expressly excludes Condominium Associations from the scope of such term (even though the scope of such term under Chapter 205 expressly includes Condominium Associations).<sup>54</sup>

As a result of the Texas Property Code’s inconsistent use of terms to describe Homeowners Associations, most Texas attorneys practicing in this area of the law generally refer to any of these types of Homeowner Associations interchangeably as “Property Owners Associations” (or “POAs”) or simply as “Community Associations.” These terms are typically used to describe any organization of property owners (regardless of whether it is a Condominium Association or another type of owners association) that is a “mandatory membership organization” made up of Unit or Lot owners who become obligated to such membership as a result of their ownership of such Unit or Lot.<sup>55</sup> For simplicity, all such residential property owners associations shall be referred to by their most common moniker, either “HOAs” or “Homeowners Associations” for the remainder of this paper when no distinction is to be made between Homeowners Associations overseeing both residential Subdivision Developments and Condominium Developments. However, where it is necessary to distinguish between these two types of associations, this paper will refer to Homeowners Associations overseeing residential Condominium Developments as “Condominium Associations” and Homeowner Associations overseeing residential Subdivision Developments or similar planned developments in which all of the land has been divided into two or more parts as “Subdivision Associations.” Similarly, owners of Units and Lots in an Association-Governed Community shall be referred to simply as “Homeowners” when no distinction is to be made between the two, but shall be referred to specifically as either “Lot Owners” or “Unit Owners” when necessary to distinguish between the two types of property owners.

<sup>54</sup> Tex. Prop. Code § 209.002(7).

<sup>55</sup> The term “Property Owners Association” is also preferred among attorneys because it is inclusive of associations made up of owners of residential and non-residential subdivision Lots and condominium Units as well; whereas the term “Homeowners Association” is more indicative of an association of owners of only residential Lots and Units.

<sup>53</sup> Tex. Prop. Code §§ 202.001(2), 206.001(1).

**V. AUTHORITY OF TEXAS HOMEOWNERS ASSOCIATIONS TO LEVY ASSESSMENTS AGAINST LOTS OR UNITS**

The authority of a Texas Homeowners Association to levy Assessments is primarily derived from its Governing Documents. If the Homeowners Association is a Condominium Association, however, the Texas Uniform Condominium Act also provides authority for a Condominium Association to levy Assessments against its Unit Owners for Common Expenses of the Condominium Development.<sup>56</sup>

The term “Assessment” refers to the charges that are assessed by a Homeowners Association against its Homeowners to pay for common expenses associated with the operation of the Homeowners Association and maintenance of the Common Areas or Common Elements in the community. Assessments can take many forms, but they are generally categorized as either Regular Assessments, Special Assessments, or Individual Assessments. The term “Regular Assessments” (also sometimes called “Annual Assessments”) refers to those Assessments that are levied by a Homeowners Association in a uniform manner against all Lots or Units in a community on some type of regular basis, such as monthly, quarterly, bi-annually, or annually.

The term “Special Assessments,” on the other hand, refers to Assessments that are levied by the Homeowners Association in a uniform manner against all Lots or Units on a one-time basis due to some special circumstance. Under most Declarations, Homeowners must approve a Special Assessment before a Homeowners Association may levy a Special Assessment against the Lots or Units in the community.

Finally, the term “Individual Assessments” refers to Assessments that are levied by the Homeowners Association against Lots or Units on an individual, non-uniform, basis. An example of an Individual Assessment is an Assessment levied by the Homeowners Association against a particular Lot for damage to the Common Areas or when a Condominium Association pays for all water usage by Unit Owners but levies Individual Assessments against each Unit based on the amount of water each uses. Depending on the basis for an Individual Assessment, it may be levied by the Homeowners Association on a regular basis or on a one-time basis due to some special circumstance.

The type of Assessments and the amount of Assessments that a Homeowners Association may levy against Lots or Units will generally be controlled by the provisions of the Homeowners Association’s

Governing Documents, and the Board of Directors may not exceed such authority. The Declaration should also set out any procedures for approving a Special Assessment, as well as any limitations on the ability of the Homeowners Association to increase the amount of Regular Assessments or levy Individual or Special Assessments.

**VI. OBLIGATION OF HOMEOWNERS TO PAY ASSESSMENTS**

The authority of the Homeowners Association to levy Assessments necessarily includes an obligation of the Homeowners to pay such Assessments. This obligation is contractual in nature and is binding upon a Homeowner who acquires title to an applicable Lot or Unit. In most cases, where the Governing Documents create the authority to levy Assessments, there will also be a provision mandating that the obligation to pay such Assessments is a personal obligation of the Homeowner. Such a provision means that the Homeowner remains obligated to pay all Assessments levied against such Homeowner’s Lot or Unit during the time of his or her ownership of such property, regardless of whether such Homeowner subsequently ceases owning such property. In other words, if Assessments levied against a Lot or Unit during the period of a person’s ownership are not paid, such person continues to have a personal obligation to pay such unpaid Assessments even after his or her ownership terminates. This is because the obligation to pay the Assessments is personal to the Homeowner, not the Lot or Unit. This is certainly true for Unit Owners, regardless of whether or not it is so stated in the Condominium Association’s Governing Documents, because the Texas Uniform Condominium Act establishes the personal liability of Unit Owners to pay Assessments levied during their ownership of their Unit.<sup>57</sup>

**VII. CREATION AND PERFECTION OF ASSESSMENT LIENS**

A lien is a form of security interest granted over an item of property to secure the payment of a debt or performance of some other obligation. In the context of Homeowners Associations, a Homeowner’s obligation to pay Assessments levied by a Homeowners Association is typically secured by a lien (commonly referred to as an “Assessment Lien”) in favor of the Homeowners Association that attaches to each Lot or Unit in the applicable community.

An Assessment Lien is essentially a contractual lien in favor of a Homeowners Association that is created by and reserved in the Declaration that

<sup>56</sup> Tex. Prop. Code § 82.102(a)(2).

<sup>57</sup> Tex. Prop. Code § 82.113(a).

establishes such Homeowners Association.<sup>58</sup> If the Homeowners Association is a Subdivision Association, the creation and reservation of an Assessment Lien in favor of the Subdivision Association must be expressly specified in the Declaration. If the Homeowners Association is a Condominium Association, however, a lien securing payment of Assessments is automatically created in favor of the Condominium Association by the filing of its Declaration, whether expressly mentioned in the Declaration or not.<sup>59</sup>

In most situations, a Homeowners Association's Declaration will also provide that the Assessment Lien is evidenced by the recordation of the Declaration alone, and that there is no requirement of the Homeowners Association to record additional documents or notices in the Official Public Records of the county in which the Subdivision or Condominium Development is located in order to establish or perfect its Assessment Lien. This is certainly true for Condominium Associations because the Texas Uniform Condominium Act expressly provides that a Condominium Association's Assessment Lien is created by the recording of its Declaration, which constitutes record notice and perfection of such lien.<sup>60</sup> There is no comparable Texas law concerning establishment of an Assessment Lien in favor of a Subdivision Association and because Declarations of Texas Homeowners Association are rarely drafted in the same way, each Subdivision Association should carefully review its Declaration to ensure that an Assessment Lien in its favor has been properly established and to identify any specific or additional procedural requirements that must be performed in order to validly perfect its Assessment Lien.

Regardless of whether a Homeowners Association is required to record any additional documents or notices in order to perfect its Assessment Lien, many Homeowners Associations still prefer to record a "Notice of the Assessment Lien" in the Official Public Records of the county in which the Homeowners Association is located so as to put third-parties, including any potential purchasers or title companies, on notice that there are unpaid

Assessments currently outstanding with respect to a particular Lot or Unit that are secured by an Assessment Lien.

### **VIII. SCOPE OF ASSESSMENT LIENS**

In most cases, a Homeowners Association's Declaration will provide that an Assessment Lien secures not only payment of unpaid Assessments levied by the Homeowners Association, but also late charges, reasonable costs of collections (including attorneys fees), interest, and in some cases, even fines assessed by the Homeowners Association. The scope of a Condominium Association's Assessment Lien is defined by the Texas Uniform Condominium Act, which provides that such Assessment Lien secures payment for all regular and special Assessments, dues, fees, charges, interest, late fees, fines, collection costs, attorneys fees, and any other amount due to the Condominium Association by the Unit Owner or levied against the Unit by the Condominium Association, unless the Condominium Association's Declaration provides otherwise.<sup>61</sup> There is no similar Texas law that defines the scope of a Subdivision Association's Assessment Lien, and consequently, an Assessment Lien in favor of a Subdivision Association only secures the payment of the types of debts specifically identified in the Declaration as being secured by the Assessment Lien.

The defined scope of a Homeowners Association's Assessment Lien is important because a Homeowners Association cannot foreclose its Assessment Lien as a result of non-payment of amounts not expressly secured by the Assessment Lien under its Declaration (or under the Texas Uniform Condominium Act if it is a Condominium Association).<sup>62</sup> In other words, a Subdivision Association may not foreclose its Assessment Lien upon a Lot for unpaid charges if the Declaration does not expressly state that the Assessment Lien secures payment of such type of charges.

### **IX. PRIORITY OF ASSESSMENT LIENS**

The priority of a lien refers to its hierarchal relationship to other liens attached to a Lot or Unit, in which liens of greater priority are superior to liens of lesser priority. In general under Texas law, but subject to several exceptions, the priority of a lien is established by the date that the document creating the lien is recorded in the Official Public Records of the county in which the real property subject to such lien is located. Under this "the first in time, first in right"

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<sup>58</sup> See *Inwood North Homeowners' Association, Inc. v. Harris*, 736 S.W.2d 632, 635 (Tex. 1987).

<sup>59</sup> Tex. Prop. Code § 82.113(a). There is no comparable Texas law that establishes an Assessment Lien in favor of Subdivision Associations, so the creation of an Assessment Lien in its favor must be expressly set out in the Subdivision Association's Declaration.

<sup>60</sup> Tex. Prop. Code § 82.113(c). The Texas Uniform Condominium Act further provides that unless the Condominium Association's Declaration provides otherwise, no other recordation of a lien or notice of lien is required. Tex. Prop. Code § 82.113(c).

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<sup>61</sup> Tex. Prop. Code § 82.113(a).

<sup>62</sup> See *Brooks v. Northglen Assoc.*, 141 S.W.3d 158, 170-71 (Tex. 2004).

rule, liens recorded first in time are considered to be “senior,” or of higher priority than all liens recorded later in time, which are considered to be “junior,” or lower in priority than those liens recorded before it.<sup>63</sup> In simpler terms, every lien is junior to all liens recorded before it and senior to all liens created after it. There are some limited exceptions to this rule. A senior lienholder may agree to subordinate (make inferior) its lien to another lien that would otherwise be inferior to it. In addition, under the Texas Tax Code, liens that secure the payment of property taxes owed to ad valorem taxing entities take priority over all previously recorded liens, specifically including any Assessment Liens.<sup>64</sup>

In most cases, the Assessment Lien created by a Declaration is effective upon the recording of the Declaration, which is almost always recorded by the “Declarant” of the Declaration before any applicable property is developed or sold to Homeowners. As a result, Assessment Liens are typically created prior to and preexist a Homeowner’s purchase of his or her Lot or Unit and are perfected before a mortgage lien (also called a “Deed of Trust Lien”) is recorded by the lending institution that financed the Homeowner’s purchase of such Lot or Unit. Notwithstanding, in almost all cases, the Declarations of Texas Homeowners Associations will provide that the Homeowners Association’s Assessment Lien is subrogated in priority to purchase money mortgage liens and tax liens.<sup>65</sup> As a result, there is almost always a Deed of Trust Lien that is senior to the Homeowners Association’s Assessment Lien. In addition, there could be other potential liens that are given priority over the Homeowners Association’s Assessment Lien by the Declaration, so a review of a particular Homeowners Association’s Declaration and the local Official Public Records is required to determine the priority of its Assessment Lien.

For Condominium Developments, by virtue of the Texas Uniform Condominium Act, an Assessment

Lien in favor of a Condominium Association has priority over any other lien except:

- (2) a lien for real property taxes and other governmental Assessments or charges against a Unit;<sup>66</sup>
- (3) a lien or encumbrance recorded before the Condominium Association’s Declaration is recorded;<sup>67</sup>
- (4) a first vendor's lien or first deed of trust lien recorded before the date on which the Assessment sought to be enforced becomes delinquent under the Condominium Association’s Declaration, Bylaws, or Association Rules;<sup>68</sup> and
- (5) unless the Declaration provides otherwise, a lien for construction of Improvements to a Unit or an assignment of the right to insurance proceeds on the Unit if the lien or assignment is recorded or duly perfected before the date on which the Assessment sought to be enforced becomes delinquent under the Condominium Association’s Declaration, Bylaws, or Association Rules.<sup>69</sup>

## **X. FORECLOSURE OF ASSESSMENT LIENS**

There are two types of procedures for foreclosing an Assessment Lien under Texas law: judicial foreclosure and non-judicial foreclosure. All Texas Homeowners Associations are authorized to foreclose their Assessment Lien by judicial foreclosure procedures, but they may only foreclose their Assessment Liens by non-judicial foreclosure procedures if expressly authorized to do so by their Declaration or Texas law. Texas Condominium Associations are authorized by the Texas Uniform Condominium Act to foreclose their Assessment Liens by judicial or non-judicial procedures.<sup>70</sup> There is no comparable law authorizing a Texas Subdivision Association to conduct non-judicial foreclosure of its Assessment Lien. As a result, a Texas Subdivision Association may only foreclose an Assessment Lien by non-judicial procedures if expressly authorized to do so under their Declaration.

<sup>63</sup> See *World Help v. Leisure Lifestyles, Inc.*, 977 S.W.2d 662, 668 (Tex. App.—Fort Worth 1998, pet. denied); *Windham v. Citizens Nat. Bank*, 105 S.W.2d 348, 351 (Tex. Civ. App.—Austin 1937, writ dismissed).

<sup>64</sup> Tex. Tax Code § 32.05.

<sup>65</sup> This is because a lending institution will almost always require that it have the most senior lien on any real property collateralizing a mortgage loan. Since a Homeowners Association’s Assessment Lien is generally created before an individual owner purchases his or her Lot or Unit, unless the Homeowners Association’s Declaration subordinates the priority of its Assessment Lien under that of the lending institution’s lien, most lending institutions would refuse to loan money to a Homeowner to purchase an applicable Lot or Unit for fear that foreclosure of the Homeowners Association’s Assessment Lien could wipe out its lien.

<sup>66</sup> Tex. Prop. Code § 82.113(b)(1). Foreclosure of a tax lien does not discharge the Condominium Association’s Assessment Lien for amounts becoming due after the date of foreclosure of the tax lien. Tex. Prop. Code § 82.113(l).

<sup>67</sup> Tex. Prop. Code § 82.113(b)(2).

<sup>68</sup> Tex. Prop. Code § 82.113(b)(3).

<sup>69</sup> Tex. Prop. Code § 82.113(b)(4).

<sup>70</sup> Tex. Prop. Code § 82.113(e).

### A. Judicial Foreclosure of Assessment Liens

Judicial foreclosure refers to the process by which the right to foreclose a lien is established by judicial proceeding and then is carried out by order of the court. In order to judicially foreclose an Assessment Lien, a Homeowners Association must file a lawsuit against the delinquent Homeowner and obtain a judgment against such Homeowner that: (1) establishes the amount owed to the Homeowners Association (including the specific amount owed that is secured by the Homeowners Association's Assessment Lien); and (2) orders the Homeowners Association's Assessment Lien be foreclosed on such Homeowner's property to satisfy the amount awarded to the Homeowners Association that is found to be secured by its Assessment Lien.

#### *Burden of Proof in a Judicial Foreclosure Lawsuit*

At a trial on the merits of a judicial foreclosure lawsuit, a Homeowners Association will have to prove:

- (1) the defendant-Homeowner's Lot or Unit is subject to the applicable Declaration;
- (2) the Declaration authorizes the Homeowners Association to levy Assessments against the defendant-Homeowner's Lot or Unit;
- (3) the defendant-Homeowner has not paid the Assessments levied against his or her Lot or Unit;
- (4) the amount of delinquent Assessments and other amounts owed by the defendant-Homeowner to the Homeowners Associations;
- (5) the Declaration creates an Assessment Lien in favor of the Homeowners Association that secures payment of delinquent Assessments and other amounts owed by the defendant-Homeowner to the Homeowners Association; and
- (6) the amount of delinquent Assessments and other amounts owed by the defendant-Homeowner to the Homeowners Association that is secured by the Homeowners Association's Assessment Lien.

Assuming the Homeowners Association prevails at trial, the court will enter judgment in favor of the Homeowners Association in which it awards the Homeowners Association a monetary award and orders the Homeowners Association's Assessment Lien be foreclosed on the defendant-Homeowner's Lot or Unit to satisfy the portion of such monetary award that is secured by the Homeowners Association's Assessment Lien.

#### *Conducting a Judicial Foreclosure Sale*

Following the entry of a judgment ordering the foreclosure of the Homeowners Association's Assessment Lien upon the defendant-Homeowner's Lot or Unit, the clerk of the court will prepare an "Order of Sale," which directs the sheriff or constable of the county in which the defendant-Homeowner's Lot or Unit is located to sell such Lot or Unit by public auction and to apply the proceeds from such sale to the secured amount awarded to the Homeowners Association under the judgment. The Order of Sale should describe the Lot or Unit to be sold with legal sufficiency and contain appropriate directions as to the time, place, terms, and conditions of the sale.<sup>71</sup>

Real property to be sold by a sheriff or constable pursuant to an Order of Sale is required to be sold by public auction, at the courthouse door of the county in which the property is located, on the first Tuesday of the month between the hours of 10 a.m. and 4 p.m.<sup>72</sup> Prior to conducting a sale of real property under an Order of Sale, the sheriff or constable is required to advertise the time and place of sale of such real property by having a notice of sale, specifying such information, published in the English language in a newspaper published in the county in which the defendant-Homeowner's Lot or Unit is located, at least once a week for three consecutive weeks preceding the date of such sale.<sup>73</sup> In addition, the sheriff or constable must give the defendant-Homeowner (or his or her attorney) written notice of such sale, by either personal-delivery or mail.<sup>74</sup> The notices of sale that are required to be published and given to the defendant-Homeowner must contain a statement of the authority by virtue of which the sale is to be made, the time of levy, the time and place of sale, and a brief description of the property to be sold, including the number of acres, original survey,

<sup>71</sup> *Allday v. Whittaker*, 1 S.W. 794, 795 (Tex. 1886).

<sup>72</sup> Tex. R. Civ. P. 646a. For purposes of a judicial foreclosure, the term "courthouse door" of a county refers to either of the principal entrances to the building provided by the proper authority for the holding of the district court, or if from any cause there is no such building, then the door of the building where the district court was last held in such county shall be deemed to be the courthouse door. Tex. R. Civ. P. 648.

<sup>73</sup> Tex. R. Civ. P. 647. The first of said three publications is required to appear not less than twenty (20) days immediately preceding the date of sale. Tex. R. Civ. P. 647. If there is no newspaper published in the county, or none which will publish the notice of sale for the requisite compensation set by court rule, the sheriff or constable must then post such notice in writing in three public places in the county, one of which shall be at the courthouse door of such county, for at least twenty days successively next before the date of sale. Tex. R. Civ. P. 647.

<sup>74</sup> Tex. R. Civ. P. 647.

locality in the county, and the name by which the land is most generally known.<sup>75</sup>

The sheriff or constable must sell the property to the highest bidder at the sale for cash, unless the highest bidder is the judgment creditor. In such event, the judgment creditor is entitled to apply the amount awarded in the judgment against his or her bid amount.<sup>76</sup> To the extent the highest bid is a cash bid or a partial cash bid, the cash proceeds from the sale will be applied first to the amounts awarded to the judgment creditor, and if there is any remaining surplus proceeds, then to the defendant-Homeowner.

#### *Advantages and Disadvantages of Judicial Foreclosure*

There are many advantages and disadvantages to foreclosing an Assessment Lien by judicial proceeding. By seeking a judgment and court-ordered foreclosure, the process is supervised by a court of law and there is less likelihood that the foreclosure could be challenged on the basis of a lack of due process or abuse by the Homeowners Association. In addition, by obtaining a judgment for the amounts owed to the Homeowners Association by the Homeowner, the Homeowners Association can abstract the judgment, which creates a “Judgment Lien” that attaches to any non-exempt real and personal property owned by such Homeowner in each county in which the judgment is abstracted. This may give the Homeowners Association the ability to foreclose on other real or personal property owned by the delinquent-Homeowner in addition to the Lot or Unit subject to its Assessment Lien in order to satisfy the judgment.

The disadvantages of the judicial foreclosure procedure are basically the time involved in prosecuting a lawsuit in order to obtain the judgment and the increased amount of attorneys fees incurred in such endeavor. A lawsuit can, and if contested, often does, take more than a year to go to trial. Even after the trial, a judgment could be appealed, which could potentially extend the proceedings even longer. In addition, attorneys fees incurred in a judicial foreclosure lawsuit can be significant. Even if the court awards the Homeowners Association all of the attorneys fees it incurs, the foreclosure of the Homeowners Association’s Assessment Lien may not generate enough proceeds to cover all of the amounts awarded to the Homeowners Association, and in some cases, the sales proceeds may not even be enough to

cover just the attorneys fees incurred by the Homeowners Association in conducting the judicial foreclosure.

#### **B. Non-Judicial Foreclosure of Assessment Liens**

Non-judicial foreclosure is a faster, less expensive foreclosure procedure than judicial foreclosure. Unlike a judicial foreclosure, a non-judicial foreclosure is conducted without court supervision and is not carried out by the county sheriff. Instead, a non-judicial foreclosure sale is performed by a trustee appointed by the Homeowners Association without any prior hearing or judicial determination.

Non-judicial foreclosures of real property in Texas are governed by Chapter 51 of the Texas Property Code, and the non-judicial foreclosure of an Assessment Lien by a Homeowners Association must be done in compliance with both Chapter 51 and the Homeowners Association’s Declaration. The non-judicial foreclosure process essentially consists of three steps: (1) appointment of a trustee; (2) notice of foreclosure sale; and (3) conducting the foreclosure sale.

#### *Appointment of a Trustee to Exercise Power of Sale*

The non-judicial foreclosure process requires the Homeowners Association to first appoint a person to act as a trustee for the purpose of conducting a non-judicial foreclosure sale of the subject property under the provisions of the Declaration.<sup>77</sup> The authority to appoint a trustee to exercise a power of sale against another person’s property must be granted by contract or law. Under the Texas Uniform Condominium Act, when a Unit Owner acquires ownership of a Unit, the Unit Owner is considered to have automatically granted the Condominium Association a power of sale in connection with the Condominium Association’s Assessment Lien.<sup>78</sup> The Texas Uniform Condominium Act further provides that the Board of Directors of a Condominium Association may, by written resolution, appoint an officer, agent, trustee, or attorney of the Condominium Association to exercise such power of sale on behalf of the Condominium Association.<sup>79</sup>

In the case of a Subdivision Association, there is no similar law providing for the automatic grant of a power of sale on behalf of Lot Owners in favor of their Subdivision Association, and any such power of sale must be expressly authorized by the Subdivision Association’s Declaration. In almost all cases where a

<sup>75</sup> Tex. R. Civ. P. 647.

<sup>76</sup> *Blum v. Rogers*, 9 S. W. 595, 597 (Tex. 1888); *Needham v. Cooney*, 173 S.W. 979, 982 (Tex. Civ. App.—El Paso 1915, writ ref’d). To the extent a judgment creditor’s bid exceeds the amount of the judgment, such excess amount constitutes a cash bid.

<sup>77</sup> In most cases, the trustee appointed by the Homeowners Association will be its attorney, but it is not required to be.

<sup>78</sup> Tex. Prop. Code § 82.113(d).

<sup>79</sup> Tex. Prop. Code § 82.113(d).

Declaration establishes an Assessment Lien in favor of a Subdivision Association and authorizes it to exercise non-judicial foreclosure procedures, the Declaration will include provisions granting the Subdivision Association a power of sale and setting forth procedures for appointing a trustee to conduct a non-judicial foreclosure sale of a delinquent Homeowner's Lot.

*Notice of Non-Judicial Foreclosure Sale*

The second step of the non-judicial foreclosure process consists of providing notice of the foreclosure sale to the delinquent Homeowner and the public. However, if the delinquent Homeowner's property is used as his or her residence, before an appointed trustee may initiate the notice of the foreclosure sale, the trustee must provide the delinquent Homeowner a written "Pre-Foreclosure Notice," by certified mail, that: (1) states that the Homeowner is in default of such Homeowner's obligation to pay Assessments under the Declaration; (2) identifies the amount of delinquent Assessments and other amounts owed by such Homeowner to the Homeowners Association that is secured by the Homeowners Association's Assessment Lien; and (3) gives such Homeowner at least twenty (20) days to cure the default by paying all outstanding amounts owed to the Homeowners Association.<sup>80</sup> The Pre-Foreclosure Notice must state the name and address of the sender of such notice and contain the following advisory, conspicuously printed in boldface or underlined type:

"Assert and protect your rights as a member of the armed forces of the United States. If you are or your spouse is serving on active military duty, including active military duty as a member of the Texas National Guard or the National Guard of another state or as a member of a reserve component of the armed forces of the United States, please send written notice of the active duty military service to the sender of this notice immediately."<sup>81</sup>

If the delinquent Homeowner does not cure his or her default within twenty (20) days of receipt of such Pre-Foreclosure Notice, the appointed trustee may

then proceed with the non-judicial foreclosure process by providing the public and the delinquent Homeowner with notice of the intended foreclosure sale of the delinquent Homeowner's Lot or Unit.

It is important to note, that the federal Fair Debt Collection Practices Act applies to the collection of Assessments by attorneys and requires any initial communication with a Homeowner by an attorney to include the "mini-Miranda" notice informing the Homeowner that unless he or she disputes the validity of the debt within thirty (30) days of receipt of such notice, the debt will be assumed to be valid.<sup>82</sup> Accordingly, if the Pre-Foreclosure Notice constitutes the initial communication between the attorney and the Homeowner, the Pre-Foreclosure Notice should include the thirty-day mini-Miranda notice and provide the Homeowner at least 30 days to cure the default.

A "Notice of Foreclosure Sale" must be provided to the public and the Homeowner by the appointed trustee at least twenty-one (21) days before the date of the foreclosure sale by the following methods:

- (1) posting a copy of the Notice of Foreclosure Sale at the courthouse door of each county in which the Lot or Unit is located;<sup>83</sup>
- (2) filing in the office of the county clerk of each county in which the Lot or Unit is located a copy of the Notice of Foreclosure Sale that was posted at the courthouse door;<sup>84</sup> and
- (3) serving the delinquent Homeowner with a copy of the Notice of Foreclosure sale.<sup>85</sup>

If the Lot or Unit to be foreclosed is not used as the Homeowner's residence, and consequently, no

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<sup>82</sup> 15 U.S.C. § 1692g(a). *See also Heintz v. Jenkins*, 514 U.S. 291 (1995) (holding that an attorney is a debt collector if the attorney regularly tries to obtain payment of consumer debts due to another, even if the attorney's collection activities are limited solely to litigation); *Ladick v. Van Gemert*, 146 F.3d 1205, 1206-07 (10th Cir. 1998) (holding that assessments levied by Homeowners Associations generally constitute a consumer debt under the Federal Fair Debt Collection Practices Act).

<sup>83</sup> Tex. Prop. Code § 51.002(b)(1). If the Lot or Unit is located in more than one county, a copy of the Notice of Foreclosure Sale must be posted at the courthouse door of each such county and the Notice of Sale must designate the county in which the Lot or Unit will be sold. Tex. Prop. Code § 51.002(b)(1).

<sup>84</sup> Tex. Prop. Code § 51.002(b)(2).

<sup>85</sup> Tex. Prop. Code § 51.002(b)(3). Service of a Notice of Foreclosure Sale on a delinquent Homeowner by certified mail is considered completed when the written Notice of Foreclosure Sale is deposited in the United States mail, postage prepaid, and addressed to the Homeowner at the Homeowner's last known address. Tex. Prop. Code § 51.002(e).

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<sup>80</sup> Tex. Prop. Code § 51.002(d). Service of notice of default on a delinquent Homeowner by certified mail is considered completed when the written notice is deposited in the United States mail, postage prepaid, and addressed to the Homeowner at the Homeowner's last known address. Tex. Prop. Code § 51.002(e).

<sup>81</sup> Tex. Prop. Code § 51.002(i). Section 51.002(i) was enacted by the 2011 Texas legislature.

Pre-Foreclosure Notice is sent to such Homeowner, then the Notice of Foreclosure Sale must state the name and address of the sender of such notice and contain the following advisory, conspicuously printed in boldface or underlined type:

“Assert and protect your rights as a member of the armed forces of the United States. If you are or your spouse is serving on active military duty, including active military duty as a member of the Texas National Guard or the National Guard of another state or as a member of a reserve component of the armed forces of the United States, please send written notice of the active duty military service to the sender of this notice immediately.”<sup>86</sup>

#### *Conducting the Non-Judicial Foreclosure Sale*

A non-judicial foreclosure sale of real property must be by public auction and may only be held between 10 a.m. and 4 p.m. on the first Tuesday of any calendar month.<sup>87</sup> The foreclosure sale must take place at the area designated for foreclosure sales at the county courthouse in the county in which the Lot or Unit is located, or if the Lot or Unit is located in more than one county, the sale may be made at the courthouse in any county in which such Lot or Unit is located, so long as it is the county designated in the Notice of Foreclosure Sale.<sup>88</sup>

On the date of the foreclosure sale, the appointed trustee will appear at the designated area of the courthouse for conducting foreclosure sales and simply read a copy of the Notice of Foreclosure Sale, state the terms of the sale (for example, cash bids only), and open the sale up for bidding. The appointed trustee may set reasonable conditions for conducting the public sale if the conditions are announced before bidding is opened by the appointed trustee.<sup>89</sup>

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<sup>86</sup> Tex. Prop. Code § 51.002(i). Section 51.002(i) was enacted by the 2011 Texas legislature.

<sup>87</sup> Tex. Prop. Code § 51.002(a). The Notice of Foreclosure Sale must include a statement of the earliest time at which the sale will begin, and the foreclosure sale must begin no later than three (3) hours after the time stated in the Notice of Foreclosure Sale. Tex. Prop. Code § 51.002(b), (c).

<sup>88</sup> Tex. Prop. Code § 51.002(a), (b)(1). The commissioners court of each Texas county is required to designate the area at the local courthouse where foreclosure sales are to take place and shall record the designation in the Official Public Records of such county. Tex. Prop. Code § 51.002(a). If no area is designated by the commissioners court, the notice of sale must designate the area where the sale covered by such Notice of Foreclosure Sale is to take place, and the sale must occur in that area. Tex. Prop. Code § 51.002(a).

<sup>89</sup> Tex. Prop. Code § 51.0075(a).

The Texas Uniform Condominium Act authorizes Condominium Associations to bid for and purchase a Unit at foreclosure as a Common Expense.<sup>90</sup> Almost all Subdivision Associations also have authority under their Governing Documents to purchase a Lot being foreclosed upon. Bids to purchase the Lot or Unit by the Condominium or Subdivision Association at the foreclosure sale may be by credit against the amounts owed to such Homeowners Association by the delinquent Homeowners to the extent such bid amount does not exceed what the Homeowner owes the Homeowners Association. In other words, if the amount owed by the delinquent Homeowner to the Homeowners Association that is secured by the Homeowners Association's Assessment Lien is \$1,000, then the Homeowners Association may bid on the subject property by credit up to a bid amount of \$1,000. If, however, the Homeowners Association bids an amount in excess of \$1,000, any amount above \$1,000 is considered a cash bid and the Homeowners Association must produce cash in the amount of its cash bid at the foreclosure sale if it is the highest bidder.

At the conclusion of the foreclosure sale, the appointed trustee will collect the purchase price from the highest bidder, if the highest bid is in whole or in part a cash bid, and will execute a trustee's deed conveying the property to such highest bidder. To the extent any part of the purchase price of the foreclosed property consists of cash, the appointed trustee must then disburse the sales proceeds as provided by Texas law.<sup>91</sup>

#### *Advantages and Disadvantages of Non-Judicial Foreclosure*

The advantage of a non-judicial foreclosure is that it is much quicker to accomplish and is less expensive than a judicial foreclosure. The disadvantage of conducting a non-judicial foreclosure is that it creates potential liability for the Homeowners Association if not properly conducted. Any deviation from the procedures set forth in the Homeowners Association's Declaration or Chapter 51 of the Texas Property Code may be grounds for a lawsuit by the Homeowner for damages resulting from a wrongful foreclosure.

In addition, the Texas Property Owners Protection Act (Chapter 209 of the Texas Property Code) caps the amount of attorneys fees a Subdivision

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<sup>90</sup> Tex. Prop. Code § 82.113(f). Texas Condominium Associations are also expressly authorized to own, lease, encumber, exchange, sell, or convey a Unit purchased at foreclosure. Tex. Prop. Code § 82.113(f).

<sup>91</sup> Tex. Prop. Code § 51.0075(f).

Association may charge a delinquent Homeowner in a non-judicial foreclosure to the greater of: (1) one-third (1/3) of the amount of all unpaid Assessments and actual costs of collection (excluding such attorneys fees), plus interest and court costs (if interest and/or court costs are permitted to be included in the amount secured by the Assessment Lien pursuant to Texas law or the Subdivision Association's Declaration); or (2) \$2,500.<sup>92</sup>

## **XI. PRE-FORECLOSURE DUE PROCESS PROCEDURES REQUIRED BY SUBDIVISION ASSOCIATIONS**

Prior to 2011 there were no required pre-foreclosure due process procedures expressly required of Homeowners Associations, unless required by a particular Homeowners Association's Governing Documents. That remains true for Condominium Associations, but not for Subdivision Associations.

In 2011, the Texas Legislature enacted the most significant reforms to the laws governing Texas Homeowners Associations since the enactment of the Texas Uniform Condominium Act in 1993. Among such reforms, the 2011 Texas Legislature enacted new laws that now require a Subdivision Association to send a written notice of a Lot Owner's delinquent Assessment account to holders of junior deed of trust liens before it may foreclose its Assessment Lien, and if such foreclosure is to be conducted by non-judicial foreclosure procedures, to further require the Subdivision Association to obtain a court order authorizing the non-judicial foreclosure of its Assessment Lien through an expedited judicial proceeding (referred to as an "Expedited Non-Judicial Foreclosure Proceeding").<sup>93</sup>

<sup>92</sup> Tex. Prop. Code § 209.008(f).

<sup>93</sup> Tex. Prop. Code § 209.0092. Although Texas Subdivision Associations are now required to obtain judicial authorization prior to conducting a non-judicial foreclosure of its Assessment Lien through a legal proceeding, such proceeding is not the equivalent of a judicial foreclosure. Tex. R. Civ. P. 735.2. The procedures for such expedited legal proceeding only apply to the foreclosure of liens that establish a power of sale in the lienholder, but which Texas law requires a court order prior to foreclosure. Tex. R. Civ. P. 735.1. If a Subdivision Association's Declaration does not expressly authorize it to foreclose its Assessment Lien by non-judicial foreclosure procedures or does not convey a power of sale to the Subdivision Association, then it may only foreclose its Assessment Lien by judicial foreclosure procedures and it may not utilize the procedures for expedited judicial authorization of a non-judicial foreclosure sale under Texas Rules of Civil Procedure 735 and 736. Notwithstanding, even if an Assessment Lien is eligible to be foreclosed non-judicially under the expedited procedures established by Texas Rules of Civil Procedure 735 and 736, a Subdivision Association can still elect to foreclose its Assessment Lien by judicial foreclosure procedures. Tex. R. Civ. P. 735.3. In such event, the Subdivision Association is not required to obtain judicial authorization under the expedited procedures established

### **A. Required Notice to Holders of Junior Deed of Trust Liens and Opportunity to Cure**

Newly-enacted Section 209.0091 of the Texas Property Code now requires a Texas Subdivision Association to provide written notice of a Lot Owner's delinquent account and opportunity to cure such delinquent account to holders of recorded deed of trust liens that are inferior in priority to (or other junior to) the Subdivision Association's Assessment Lien before it may foreclose such Lien.<sup>94</sup> More specifically, such written notice must provide an applicable lienholder notice of the total amount of the Lot Owner's delinquent account giving rise to the foreclosure and allow such lienholder a sixty (60) day period to pay such delinquent account before the Subdivision Association may proceed with foreclosure of its Assessment Lien.<sup>95</sup> In addition, such written notice must be sent by certified mail, return receipt requested, to the address of an applicable lienholder as shown on the recorded deed of trust lien or other recorded document in the Official Public Records relating to the applicable Lot for which such notice is being given.<sup>96</sup>

### **B. Required Judicial Authorization Prior to Non-Judicial Foreclosure of a Subdivision Association's Assessment Lien**

In addition to providing written notice of a Lot Owner's delinquent account to holders of junior deed of trust liens, before a Subdivision Association may initiate foreclosure of its Assessment Lien by non-judicial foreclosure procedures, it must now first obtain a court order authorizing it to do so through an Expedited Non-Judicial Foreclosure Proceeding, which is governed by Texas Rules of Civil Procedure 735 and 736.<sup>97</sup>

#### *Filing a Non-Judicial Foreclosure Application by a Subdivision Association*

To initiate an Expedited Non-Judicial Foreclosure Proceeding, a Subdivision Association must file a verified application (called a "Non-Judicial Foreclosure Application") in a court of competent jurisdiction in the county in which all or part of the

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by Texas Rules of Civil Procedure 735 and 736 in addition to the judgment for judicial foreclosure. *See* Comment to 2011 Change to Texas Rules of Civil Procedure 735 and 736.

<sup>94</sup> Tex. Prop. Code § 209.0091(a).

<sup>95</sup> Tex. Prop. Code § 209.0091(a).

<sup>96</sup> Tex. Prop. Code § 209.0091(b).

<sup>97</sup> Tex. R. Civ. P. 735.1. Texas Rules of Civil Procedure 735 and 736 also govern expedited judicial proceedings for obtaining required judicial authorization to non-judicially foreclose liens securing a home equity loan, a reverse mortgage, or a home equity line of credit. Tex. R. Civ. P. 735, 736.

Lot to be foreclosed is located.<sup>98</sup> The Non-Judicial Foreclosure Application must:

- (1) identify the name and last known address of the Subdivision Association (referred to as the “Petitioner” under Texas Rule of Civil Procedure 736);<sup>99</sup>
- (2) identify the name and last known address of each person obligated to pay the unpaid Assessments secured by the Subdivision Association’s Assessment Lien who has a current ownership interest in the Lot to be foreclosed (referred to as the “Respondent” under Texas Rule of Civil Procedure 736);<sup>100</sup>
- (3) identify the Lot to be foreclosed by its legal description and commonly known street address;<sup>101</sup>
- (4) state that the lien to be foreclosed is a “property owners’ association assessment lien under Section 29.0092 of the Texas Property Code”;<sup>102</sup>
- (5) describe the authority of the Subdivision Association to seek foreclosure of the Assessment Lien;<sup>103</sup>
- (6) identify, as of a specific date not less than sixty (60) days prior to the date the Non-Judicial Foreclosure Application is filed, the number of unpaid regular and special Assessments owed by the Respondent to the Subdivision Association and the amount required to cure such Respondent’s default;<sup>104</sup>
- (7) state that all requisite notices to cure such Respondent’s delinquent Assessment account have been mailed to each person as required under applicable law and the Declaration and that any applicable

opportunities to cure such delinquent Assessment account have expired;<sup>105</sup>

- (8) state that before the Non-Judicial Foreclosure Application was filed, any other prior action required to be performed under applicable law and the Declaration was performed;<sup>106</sup> and
- (9) conspicuously state: (a) “that legal action is not being sought against the occupant of the property, unless the occupant is also named as a respondent in the application;” and (b) “that if the petitioner obtains a court order, the petitioner will proceed with a foreclosure of the Lot in accordance with applicable law and the terms of the lien sought to be foreclosed.”<sup>107</sup>

In addition, the Non-Judicial Foreclosure Application must include an affidavit of material facts signed by a representative of the Subdivision Association describing the basis for foreclosure, and must also include as attachments: (a) a legible copy of: the Subdivision Association’s Declaration or other Dedicatory Instrument establishing its Assessment Lien, and (b) each notice required to be mailed to the identified Respondent before the Non-Judicial Foreclosure Application was filed and proof of mailing of each such notice.<sup>108</sup>

Upon filing the Non-Judicial Foreclosure Application, the court clerk will issue a separate citation for each person identified Respondent and one additional citation for the occupant or occupants of the Lot to be foreclosed.<sup>109</sup> The clerk of the court is required to send a citation and copy of the Non-Judicial Foreclosure Application to each applicable

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<sup>98</sup> Tex. R. Civ. P. 736.1(a). A Non-Judicial Foreclosure Application may also be filed in a probate court with jurisdiction over proceedings involving a Lot that is part of a decedent’s estate. Tex. R. Civ. P. 736.1(a).

<sup>99</sup> Tex. R. Civ. P. 736.1(d)(1)(A).

<sup>100</sup> Tex. R. Civ. P. 736.1(d)(1)(B).

<sup>101</sup> Tex. R. Civ. P. 736.1(d)(2).

<sup>102</sup> Tex. R. Civ. P. 735.1, 736.1(d)(3)(A).

<sup>103</sup> Tex. R. Civ. P. 736.1(d)(3)(B). In most cases, such authority will be the Declaration or other Dedicatory Instrument that establishes the Assessment Lien and the Subdivision Association’s authority to foreclose such lien by non-judicial foreclosure procedures.

<sup>104</sup> Tex. R. Civ. P. 736.1(d)(3)(E).

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<sup>105</sup> Tex. R. Civ. P. 736.1(d)(3)(F).

<sup>106</sup> Tex. R. Civ. P. 736.1(d)(3)(G).

<sup>107</sup> Tex. R. Civ. P. 736.1(d)(5). The comments to Texas Rule of Civil Procedure 735.1(d)(5) make reference to Section 1.201(b)(10) of the Texas Business and Commerce Code in regards to the requirement of conspicuousness. Pursuant to Section 1.201(b)(10), to be conspicuously stated, language must be written, displayed, or presented so that a reasonable person against which it is to operate ought to have noticed it. Tex. Bus. & Com. Code § 1.201(b)(10). Statements in the body of a document may be made conspicuous by use of larger type than the surrounding text, or by use of contrasting type, font, or color to the surrounding text of the same size, or by being set off from surrounding text of the same size by symbols or other marks that call attention to the statements. Tex. Bus. & Com. Code § 1.201(b)(10)(B).

<sup>108</sup> Tex. R. Civ. P. 736.1(d)(6).

<sup>109</sup> Tex. R. Civ. P. 736.3(a)(1).

Respondent and the occupant by both first class mail and certified mail.<sup>110</sup>

*Responding to a Non-Judicial Foreclosure Application*

An applicable Respondent served with citation and copy of the Non-Judicial Foreclosure Application may contest such application by filing a written response to the Non-Judicial Foreclosure Application by the first Monday after the expiration of thirty-eight (38) days from the date the citation was placed in the custody of the U.S. Postal Service, as stated on the citation.<sup>111</sup> The response must be signed by the applicable Respondent and must affirmatively state or allege (as applicable):

- (1) why the Respondent is not obligated for payment of the lien;<sup>112</sup>
- (2) why the number of months of alleged default or pay off amounts are materially incorrect;<sup>113</sup>
- (3) why any document attached to the Non-Judicial Foreclosure Application is not a true and correct copy of the original;<sup>114</sup> or
- (4) if the Respondent has paid the amounts that the Subdivision Association claims is unpaid, the distinct nature of such payments.<sup>115</sup>

A response filed by a Respondent, however, may not state an independent claim for relief, and the court is required, without a hearing, to strike and dismiss any counterclaim, cross-claim, third party claim, intervention, or cause of action filed in an Expedited Non-Judicial Foreclosure Proceeding.<sup>116</sup>

<sup>110</sup> Tex. R. Civ. P. 736.3(b)(1). A citation directed to an applicable Respondent must be mailed to his or her last known address, as identified in the Non-Judicial Foreclosure Application. Tex. R. Civ. P. 736.3(b)(1). A citation directed to an occupant or occupants of the Lot to be foreclosed must be mailed to “Occupant of [state: Lot’s mailing address]” at the address of the Lot to be foreclosed, as identified in the Non-Judicial Foreclosure Application. Tex. R. Civ. P. 736.3(b)(1). If a citation is mailed by the court clerk in accordance with Texas Rule of Civil Procedure 736.3(b)(1), the date of service is the date and time the citation was placed in the custody of the U.S. Postal Service in a properly addressed, postage prepaid envelope in accordance with the clerk’s standard mailing procedures. Tex. R. Civ. P. 736.3(b)(2).

<sup>111</sup> Tex. R. Civ. P. 736.5(b).

<sup>112</sup> Tex. R. Civ. P. 736.5(c)(2).

<sup>113</sup> Tex. R. Civ. P. 736.5(c)(3).

<sup>114</sup> Tex. R. Civ. P. 736.5(c)(4).

<sup>115</sup> Tex. R. Civ. P. 736.5(c)(5); *see also* Tex. R. Civ. P. 95.

<sup>116</sup> Tex. R. Civ. P. 736.5(d). Notwithstanding, if an applicable Lot Owner provides proof to the court clerk that he or she filed

*Ruling on a Non-Judicial Foreclosure Application*

If no response to the Non-Judicial Foreclosure Application is filed by an applicable Respondent by the due date, the Subdivision Association may file a motion and proposed order to obtain a default order granting the Non-Judicial Foreclosure Application.<sup>117</sup> In such event, and so long as the Non-Judicial Foreclosure Application complies with the requirements of Texas Rule of Civil Procedure 736.1 and was properly served on all applicable Respondents, the court must grant the Non-Judicial Foreclosure Application by default order no later than thirty (30) days after a motion for default order is filed by the Subdivision Association.<sup>118</sup>

If a response is filed by a Respondent, the court must conduct a hearing on the merits of the Non-Judicial Foreclosure Application after providing reasonable notice to the parties.<sup>119</sup> A hearing on a Subdivision Association’s Non-Judicial Foreclosure Application must be held by the Court within thirty (30) days of a request for a hearing by any party to the Expedited Non-Judicial Foreclosure Proceeding, but such hearing may not be held during the first twenty (20) days following the date such request for a hearing is filed.<sup>120</sup>

At the hearing on the merits of the Non-Judicial Foreclosure Application, the Subdivision Association has the burden to prove by affidavits on file or evidence presented at the hearing the grounds for granting the order sought in the Non-Judicial Foreclosure Application.<sup>121</sup> If the Subdivision Association establishes the authority and basis for it to foreclose its Assessment Lien by non-judicial

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bankruptcy before an order granting the Non-Judicial Foreclosure Application is signed by the judge, the Expedited Non-Judicial Foreclosure Proceeding must be abated so long as the automatic stay under the Bankruptcy Code is effective. Tex. R. Civ. P. 736.10.

<sup>117</sup> Tex. R. Civ. P. 736.7(a). For the purposes of obtaining a default order granting the Non-Judicial Foreclosure Application, all facts alleged in the Non-Judicial Foreclosure Application and supported by the included affidavit of material facts constitute prima facie evidence of the truth of the matters alleged. Tex. R. Civ. P. 736.7(a).

<sup>118</sup> Tex. R. Civ. P. 736.7(b).

<sup>119</sup> Tex. R. Civ. P. 736.6. A court is prohibited from conducting a hearing on a Non-Judicial Foreclosure Application unless a response is filed by an applicable Lot Owner. Tex. R. Civ. P. 736.6.

<sup>120</sup> Tex. R. Civ. P. 736.6. The parties to an Expedited Non-Judicial Foreclosure Proceeding are not permitted to conduct discovery. Tex. R. Civ. P. 736.4. Discovery is the formal process under the Texas Rules of Civil Procedure by which a party to a lawsuit may obtain information and documents relevant to the lawsuit from other parties to the lawsuit. *See generally*, Tex. R. Civ. P. 190 – 215.

<sup>121</sup> Tex. R. Civ. P. 736.6.

foreclosure procedures, the court must issue an order granting the Non-Judicial Foreclosure Application; otherwise, the court must deny such application.<sup>122</sup>

An order granting a Subdivision Association's Non-Judicial Foreclosure Application must describe:

- (1) the material facts establishing the basis for foreclosure of the Subdivision Association's Assessment Lien;<sup>123</sup>
- (2) the Lot to be foreclosed by its legal description and commonly known mailing address;<sup>124</sup>
- (3) the name and last known address of each Respondent subject to the order;<sup>125</sup> and
- (4) the recording or indexing information of the Declaration or other Dedicatory Instrument establishing the Assessment Lien to be foreclosed.<sup>126</sup>

Once the court enters an order granting its Non-Judicial Foreclosure Application, a Subdivision Association may proceed with the foreclosure of its Assessment Lien by non-judicial foreclosure procedures.<sup>127</sup>

In addition, an order granting or denying a Non-Judicial Foreclosure Application is final and is not subject to a motion for rehearing, new trial, bill of review, or appeal.<sup>128</sup> Any challenge to an order granting or denying a Non-Judicial Foreclosure Application must be made in a separate, independent lawsuit filed in a court of competent jurisdiction.<sup>129</sup>

*Automatic Stay and Dismissal of an Expedited Non-Judicial Foreclosure Proceeding Upon Filing of an Independent Lawsuit*

An Expedited Non-Judicial Foreclosure Proceeding and/or an order granting a Non-Judicial

Foreclosure Application is automatically stayed if a Respondent files a separate, independent lawsuit against the Subdivision Association in a court of competent jurisdiction that puts in issue any matter related to the origination, servicing, or enforcement of the Subdivision Association's Assessment Lien prior to 5:00 p.m. on the Monday before the scheduled non-judicial foreclosure sale of the applicable Lot.<sup>130</sup> If a non-judicial foreclosure sale of the applicable Lot has already been scheduled, the Respondent must give prompt notice of the filing of such lawsuit to the Subdivision Association or its attorney and the foreclosure trustee or substitute trustee by any reasonable means necessary to stop such scheduled foreclosure sale.<sup>131</sup>

In addition, within ten (10) days of filing such independent lawsuit, the Respondent must file a motion in the court in which the Expedited Non-Judicial Foreclosure Proceeding is pending advising such court that the Respondent has filed an original proceeding contesting the right of the Subdivision Association to foreclose its Assessment Lien in a court of competent jurisdiction and a proposed order to dismiss or vacate the Expedited Non-Judicial Foreclosure Proceeding.<sup>132</sup> If at the time such motion is filed no order granting the Subdivision Association's Non-Judicial Foreclosure Application has been signed by the judge, the court must dismiss the pending Expedited Non-Judicial Foreclosure Proceeding.<sup>133</sup> If, however, an order granting the Subdivision Association's Non-Judicial Foreclosure Application has already been signed by the judge, the court must issue an order vacating its prior order granting the Subdivision Association's Non-Judicial Foreclosure Application.<sup>134</sup>

**XII. STATUTORY RESTRICTIONS ON THE RIGHT TO FORECLOSE ASSESSMENT LIENS**

Regardless of the foreclosure procedure a Texas Homeowners Association is authorized to use, there are some statutory restrictions on the ability of a

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<sup>122</sup> Tex. R. Civ. P. 736.8(a).

<sup>123</sup> Tex. R. Civ. P. 736.8(b)(1).

<sup>124</sup> Tex. R. Civ. P. 736.8(b)(2).

<sup>125</sup> Tex. R. Civ. P. 736.8(b)(3).

<sup>126</sup> Tex. R. Civ. P. 736.8(b)(4).

<sup>127</sup> Tex. R. Civ. P. 736.9. In addition, upon non-judicially foreclosing the applicable Lot, a conformed copy of the order granting the Subdivision Association's a Non-Judicial Foreclosure Application must be attached to the trustee or substitute trustee's foreclosure deed. Tex. R. Civ. P. 736.12.

<sup>128</sup> Tex. R. Civ. P. 736.8(c).

<sup>129</sup> Tex. R. Civ. P. 736.8(c). An order granting a Subdivision Association's Non-Judicial Foreclosure Application is without prejudice and has no res judicata, collateral estoppel, estoppel by judgment, or other effect in any other judicial proceeding. Tex. R. Civ. P. 736.9.

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<sup>130</sup> Tex. R. Civ. P. 736.11(a).

<sup>131</sup> Tex. R. Civ. P. 736.11(b).

<sup>132</sup> Tex. R. Civ. P. 736.11(c).

<sup>133</sup> Tex. R. Civ. P. 736.11(c).

<sup>134</sup> Tex. R. Civ. P. 736.11(c). Any non-judicial foreclosure sale of a Lot after the automatic stay is invoked by the timely filing of a separate applicable lawsuit by an applicable Lot Owner is void. Tex. R. Civ. P. 736.11(d). If a voided non-judicial foreclosure sale of a Lot occurs, within ten (10) business days from receiving notice that such foreclosure sale was void, the trustee or substitute trustee that conducted the foreclosure sale must return to the buyer of the foreclosed Lot the purchase price paid by the buyer. Tex. R. Civ. P. 736.11(d).

Homeowners Association to foreclose its Assessment Lien. Under the Texas Uniform Condominium Act, a Condominium Association may not foreclose its Assessment Lien against a Unit for unpaid Assessments consisting solely of fines.<sup>135</sup> A Subdivision Association, on the other hand, may not foreclose an Assessment Lien if the unpaid amounts owed by the Lot Owner consist solely of fines assessed by the Subdivision Association, attorneys fees incurred by the Subdivision Association solely associated with fines assessed by the Subdivision Association, and/or amounts due the Subdivision Association for compilation, production, and reproduction of its records.<sup>136</sup>

### XIII. TEXAS CONSTITUTIONAL HOMESTEAD PROTECTION

The Texas Constitution affords to its citizens a certain level of protection by keeping the family homestead safe from foreclosure by creditors who seek to satisfy debts, except for a few specifically enumerated types of liens that may be imposed against a Texan's "Homestead." One of the purposes of this constitutional protection is to prevent impoverished debtors from being unable to provide a home for their families.<sup>137</sup>

#### *Scope of Homestead Property and Invocation of Homestead Protection*

Generally, a Texan's Homestead has historically consisted of the dwelling house constituting the family residence, together with the land on which it is situated and the appurtenances connected to such dwelling.<sup>138</sup> The amount of land that may constitute a Texan's Homestead is dictated by the Texas Property Code and depends on whether the property is used for purposes of an urban home or a rural home. If a Homestead is used for the purposes of an urban home (or as both an urban home and a place to exercise a calling or business), the Homestead of a family or a single, adult person shall consist of no more than ten (10) acres of land, which may be in one or more contiguous lots, together with any improvements located thereon.<sup>139</sup> On the other hand, if a Homestead

is used for the purposes of a rural home, a Homestead shall consist of no more than two hundred (200) acres for a family or one hundred (100) acres for a single, adult person, and includes the improvements located thereon.<sup>140</sup>

It is important to note, just because a property owner does not currently live at his or her property does not mean that such property is not his or her Homestead. The determination of whether a particular property constitutes a Homestead is dependent primarily on the intention of the property owner. Homestead protection may even be established upon undeveloped land if the property owner has a present intention to occupy and use the premises as his or her home in a reasonable and definite time in the future, and has made some preparations toward actual occupancy and use of such property that "are of such character and have proceeded to such an extent as to manifest beyond doubt the intention to complete the improvements and reside upon the place as a home."<sup>141</sup> In addition, even if a property owner moves from real property that he or she previously resided at as his or her Homestead, such property does not lose its Homestead status unless the property owner moves from the property with the intention not to return and claim such property as his or her Homestead.<sup>142</sup> It is the acquisition of a new Homestead, not merely the acquisition of a new home, which operates as an abandonment of Homestead rights, and even the temporary leasing of a property owner's Homestead to a third party does not constitute abandonment of the Homestead status where no other Homestead has been acquired by the property owner.<sup>143</sup>

While it is nearly impossible to determine what a property owner's intent is with regard to real property that has no house on it or that is occupied by somebody other than the property owner, a good rule of thumb is that if the owners of the property reside there, the property is most likely their Homestead. If, however, the owners of the property do not reside at such property and own a home or other real property where they do reside, then the subject property is most

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the following services provided by a municipality or under contract to a municipality: (A) electric; (B) natural gas; (C) sewer; (D) storm sewer; and (E) water. Tex. Prop. Code § 41.002(c).

<sup>135</sup> Tex. Prop. Code § 82.113(e).

<sup>136</sup> Tex. Prop. Code § 209.009.

<sup>137</sup> *Lincoln v. Bennett*, 156 S.W.2d 504, 504 (Tex. 1941).

<sup>138</sup> *Gann v. Montgomery*, 210 S.W.2d 255 (Tex. Civ. App.—Fort Worth 1948, writ ref'd n.r.e.).

<sup>139</sup> Tex. Prop. Code § 41.002(a). A Homestead is considered to be urban if, at the time the designation is made, the property is: (1) located within the limits of a municipality or its extraterritorial jurisdiction or a platted subdivision; and (2) served by police protection, paid or volunteer fire protection, and at least three of

<sup>140</sup> Tex. Prop. Code § 41.002(b). A Homestead that is used for rural purposes may consist of one or more parcels. Tex. Prop. Code § 41.002(b).

<sup>141</sup> *Lilly v. Lewis*, 249 S.W. 1095, 1096 (Tex. Civ. App.—San Antonio 1923, no writ).

<sup>142</sup> *Burkhardt v. Lieberman*, 159 S.W.2d 847, 852 (Tex. 1942).

<sup>143</sup> *Rancho Oil Co. v. Powell*, 175 S.W.2d 960, 963 (Tex. 1943) ("The acquiring of a new home is not always the acquiring of a new homestead, and one does not necessarily abandon a homestead by merely moving his home.").

likely not their Homestead. A good way to determine whether the property owner resides at his or her property is to check the records of the local appraisal district to determine what mailing address property tax information is sent to. If the property owner listed an alternative mailing address other than the subject property, and the mailing address is for residential property in which they own and reside at, then the subject real property is most likely not being occupied by the property owners and it is not their Homestead.

#### *Preemption of Homestead Protection by Preexisting Assessment Liens*

Under the Texas Constitution, only specific types of liens enumerated as exceptions to Homestead protection may be foreclosed upon a Texan's Homestead.<sup>144</sup> Such enumerated liens, however, do not include Assessment Liens in favor of Homeowners Associations.

Notwithstanding, it is well established under Texas law that while the Texas Constitution's protection of Homestead may protect a Homeowner's Lot or Unit from foreclosure by certain creditors, it will not extinguish or subvert a lien that preexists the invocation of the Homeowner's Homestead status to his or her property.<sup>145</sup> On such basis, in 1987, the Texas Supreme Court held in *Inwood North Homeowners' Association v. Harris* that a preexisting Assessment Lien in favor of a Homeowners Association was superior to the Homeowner's Homestead rights because the Assessment Lien had been in existence prior to the Homeowner's ownership of the subject property, and the invocation of such Homestead status did not extinguish the preexisting Assessment Lien.<sup>146</sup> The controlling and determinative factor of the Texas Supreme Court's holding in *Inwood North Homeowners' Association v. Harris* was that the Assessment Lien had *attached* to the subject real property prior to the establishment of the Homeowner's Homestead and, therefore, preempted the subsequent invocation of such

Homeowner's Homestead protection.<sup>147</sup> Accordingly, the dispositive issue in determining whether a Homeowners Association's Assessment Lien preempts a Homeowner's Homestead protection on his or her property is whether the Homeowners Association's Assessment Lien "attached" to the Homeowner's property before he or she established it as his or her Homestead.

The timing of an Assessment Lien's attachment is easily determined for Condominium Associations. By virtue of the Texas Uniform Condominium Act, an Assessment Lien in favor of a Texas Condominium Association is created by and attaches to the Units in the applicable Condominium Development upon the recording of the Condominium Declaration.<sup>148</sup> Thus, whether or not it is specifically stated within the Condominium Declaration, a Condominium Association's Assessment Lien attaches immediately to all Units within the Condominium Development upon the recording of the Condominium Declaration and will preempt any subsequent invocation of Homestead protection by a Unit Owner.<sup>149</sup>

Unfortunately, there is no similar Texas law applicable to Subdivision Developments. In order to determine when a Subdivision Association's Assessment Lien attaches to the Lots in its Subdivision Development, the provision in its Declaration creating the Subdivision Association's Assessment Lien must be carefully examined. Not all Declarations are drafted in the same manner, and not all provisions creating an Assessment Lien in favor of a Subdivision Association provide that the Assessment Lien attaches to the subject Lots at the time the Declaration is recorded. When reviewing the language of a Declaration provision that establishes an Assessment Lien, a Subdivision Association must determine whether the creation language contains words of present intent to establish an Assessment Lien or future intent to establish an Assessment Lien. For example, where a Declaration states something to

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<sup>144</sup> The Texas Constitution enumerates eight exceptions to Homestead protection from forced sale, including: (1) purchase money security; (2) taxes due on the Homestead; (3) certain owelty on partition; (4) refinancing of certain liens; (5) security for improvements; (6) certain extensions of credit in the nature of an equity loan; (7) reverse mortgages; and (8) special financing concerning manufactured homes. See Tex. Const. art. XVI, § 50(a)(1)-(8).

<sup>145</sup> See *Inwood North Homeowners' Association v. Harris*, 736 S.W.2d 632, 634-35 (Tex. 1987).

<sup>146</sup> *Inwood North Homeowners' Association v. Harris*, 736 S.W.2d 632, 635-36 (Tex. 1987).

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<sup>147</sup> *Inwood North Homeowners' Association v. Harris*, 736 S.W.2d 632, 635 (Tex. 1987) ("Thus, this case revolves around when the lien attached on the property. If it occurred simultaneously to or after the homeowners took title, there is authority which would deem the homestead right superior.")

<sup>148</sup> Tex. Prop. Code § 82.113(c). There is one limited exception to such rule. If, on January 1, 1994 (the date the Texas Uniform Condominium Act became effective), a Unit was, and has continuously remained, the Homestead of the Unit Owner and such Unit is subject to a Condominium Declaration that does not contain a valid Assessment Lien against such Unit, the Assessment Lien created by the Texas Uniform Condominium Act does not attach against the Unit until the Unit ceases to be the Homestead of the Unit Owner who has continuously owned such Unit since before January 1, 1994. Tex. Prop. Code § 82.113(c).

<sup>149</sup> Tex. Prop. Code § 82.113(k).

the effect of “by the recording of this Declaration, a lien to secure the payment of assessments is hereby created . . .,” such present-tense language clearly indicates that the Assessment Lien is created by and attaches to the applicable Lots upon the recording of the Declaration and it will preexist the eventual invocation of Homestead protection by the owners of Lots in such Subdivision Development.

On the other hand, a Declaration may state something to the effect of “in the event an owner shall fail to pay assessments, the Association’s lien shall become a continuing lien on the property. . . .” This is the sort of future-tense language that suggests that the Declaration creates an immediate contractual right to place a lien on a subject Lot in the future upon the failure of a Lot Owner to pay his or her Assessments, but it does not create a lien that “attaches” to all of the Lots in the Subdivision Development at the time the Declaration was recorded.<sup>150</sup> In such circumstance, a Texas court may determine that the Subdivision Association’s Assessment Lien does not preexist a Homeowner’s invocation of Homestead protection, in which event it would be unlawful for the Subdivision Association to foreclose its Assessment Lien if the Lot is the Homeowner’s Homestead.<sup>151</sup>

In general, if it is questionable as to whether a Declaration provision creating an Assessment Lien in favor of a Subdivision Association creates an Assessment Lien that attaches to the Lots in the Subdivision Development immediately upon the recording of the Declaration, the Subdivision Association should not conduct a non-judicial foreclosure of its Assessment Lien if there is any chance that the subject Lot may be the Homeowner’s Homestead. Instead, the Subdivision Association should judicially foreclose its Assessment Lien, which

provides the Homeowner the opportunity to either raise or waive the affirmative defense of Homestead.<sup>152</sup>

#### **XIV. PROTECTION OF ACTIVE DUTY MILITARY SERVICEMEMBERS FROM FORECLOSURE**

In addition to protections afforded to a Texan’s Homestead, in 2009, the Texas Legislature enacted certain statutory restrictions against foreclosure of contractual liens on real property owned by a “Military Servicemember” during a period of his or her “Active Duty Military Service” or during the nine months after the date on which such Active Duty Military Service concludes.<sup>153</sup> Such statute is only effective for foreclosure sales conducted on or after June 19, 2009, and only applies to an obligation: (1) that is secured by a contractual lien on real property that includes a dwelling owned by a Military Servicemember; (2) that originated before the date on which the Military Servicemember’s Active Duty Military Service commenced; and (3) for which the Military Servicemember is still obligated.<sup>154</sup>

A sale, foreclosure, or seizure of an applicable property owned by a Military Servicemember under a mortgage, deed of trust, or other contract lien (such as an Assessment Lien) may not be conducted during such Military Servicemember’s period of Active Duty Military Service or during the nine months after the date on which such Active Duty Military Service period concludes unless the sale, foreclosure, or seizure is conducted pursuant to either: (1) a court

<sup>150</sup> See *Red Rock Properties 2005, Ltd. v. Chase Home Finance, L.L.C.*, No. 14-08-00352-CV, 2009 Tex. App. WL 1795037 (Houston [14th Dist.] June 25, 2009, n. pet. h.) (not designated for publication).

<sup>151</sup> While there is no Texas appellate case law, designated for publication, that specifically addresses a distinction between present-tense and future-tense language of a Declaration provision creating an Assessment Lien in regards to controlling the date of “attachment” of the lien, there are several cases concerning other types of contractual liens that do hold it is the attachment and not merely the right to attach a lien in the future that controls in the context of a preexisting lien being superior to a subsequent invocation of Homestead protection. In addition, a recent Houston Court of Appeal’s opinion (that was not designated for publication) specifically held that a Subdivision Association’s Declaration that stated that the Assessment Lien “shall attach from the date of the failure of payment of the assessment” did not create a preexisting lien superior to the Homeowner’s invocation of Homestead protection. *Red Rock Properties 2005, Ltd. v. Chase Home Finance, L.L.C.*, No. 14-08-00352-CV, 2009 Tex. App. WL 1795037 (Houston [14th Dist.] June 25, 2009, n. pet. h.) (not designated for publication).

<sup>152</sup> *Watson v. Tipton*, 274 S.W.3d 791, 800 (Tex. App.—Fort Worth 2008, pet. denied) (“The plea of homestead is an affirmative defense, which must be affirmatively pleaded and cannot be raised for the first time on appeal.”).

<sup>153</sup> Tex. Prop. Code § 51.015(d). The Texas Property Code defines “Military Servicemember” as: (1) a member of the armed forces of the United States; (2) a member of the Texas National Guard or the National Guard of another state serving on active duty under an order of the President of the United States; or (3) a member of a reserve component of the armed forces of the United States who is on active duty under an order of the President of the United States. Tex. Prop. Code § 51.015(a)(3). The Texas Property Code defines “Active Duty Military Service” as: (1) service as a member of the armed forces of the United States; or (2) with respect to a member of the Texas National Guard or the National Guard of another state or a member of a reserve component of the armed forces of the United States, active duty under an order of the President of the United States. Tex. Prop. Code § 51.015(a)(1). In addition, a dependent of a Military Servicemember may also be entitled to the protections of Section 51.015 of the Texas Property Code if such dependent’s ability to comply with an obligation that is secured by a mortgage, deed of trust, or other contract lien on real property is materially affected by such Servicemember’s Active Duty Military Service. Tex. Prop. Code § 51.015(g).

<sup>154</sup> Tex. Prop. Code § 51.015(b).

order issued before the sale, foreclosure, or seizure; or (2) a waiver agreement executed by the Military Servicemember.<sup>155</sup> If a lawsuit to foreclose a lien against applicable property owned by a Military Servicemember is filed during such Military Servicemember's period of Active Duty Military Service or during the nine months after the date on which such Active Duty Military Service period concludes, upon the application of a Military Servicemember whose ability to comply with the contractual obligations secured by the lien is materially affected by such Servicemember's Active Duty Military, a court must either: (1) stay the proceedings for a period of time as justice and equity require; or (2) adjust the obligations of the contract secured by the lien to preserve the interests of all parties.<sup>156</sup> More importantly, if a person knowingly makes or causes to be made a sale, foreclosure, or seizure of applicable property owned by a Military Servicemember during such Military Servicemember's period of Active Duty Military Service or during the

nine months after the date on which such Active Duty Military Service period concludes, then he or she commits a Class A misdemeanor criminal offense.<sup>157</sup> An individual adjudged guilty of a Class A misdemeanor may be punished by a fine up to \$4,000, confinement in jail for up to one year, or both.<sup>158</sup>

Accordingly, it is very important that a Homeowners Association contemplating initiation of foreclosure procedures on its Assessment Lien perform some reasonable due diligence to determine whether the delinquent Homeowner is a Military Servicemember who is in a period of Active Duty Military Service or in the nine-month period following the conclusion of his or her Active Duty Military Service. The most direct way to determine this is to request confirmation of such information from the Homeowner him or herself, or from other residents of the property or even the delinquent Homeowner's neighbors.

Alternatively, the Servicemembers Civil Relief Act Centralized Verification Service (commonly referred to as "SCRACVS") maintains a website at [www.servicememberscivilreliefact.com](http://www.servicememberscivilreliefact.com), at which a search can be performed to determine if an individual is on active military duty. SCRACVS's website covers Military Servicemembers serving in the Army, Navy, Air Force, Marine Corps, Coast Guard, National Oceanic and Atmospheric Administration, and Public Health Service. In addition, a verification of an individual's active military status can be performed by sending a written inquiry to each of the seven agencies (i.e., Army, Navy, etc.) with an enclosed check for \$5.20 per name for each agency; however, some military agencies may take up to five months to respond.<sup>159</sup>

## **XV. POST-FORECLOSURE NOTICE REQUIREMENTS OF SUBDIVISION ASSOCIATIONS**

A Subdivision Association that conducts a foreclosure sale of a Homeowner's Lot, whether by judicial or non-judicial foreclosure procedures, must send to the Lot Owner and all lienholders of record, within thirty (30) days after the date of the foreclosure sale, a written notice stating the date and time the

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<sup>155</sup> Tex. Prop. Code § 51.015(d). An agreement by a Military Servicemember to waive his or her rights under Section 51.015 of the Texas Property Code must be: (1) in writing in at least twelve-point type; (2) executed as an instrument separate from the obligation to which the waiver applies; and (3) made under a written agreement that is executed during or after such Military Servicemember's period of Active Duty Military Service and specifies the legal instrument to which the waiver applies (and, if the Military Servicemember is not a party to such legal instrument, also specifies the Military Servicemember concerned). Tex. Prop. Code § 51.015(e). If a waiver agreement is executed by an individual who after the execution of such waiver agreement enters Active Duty Military Service, or by a dependent of an individual who after the execution of such waiver enters Active Duty Military Service, the waiver agreement shall not be valid after the beginning of the period of the Active Duty Military Service unless the waiver agreement was executed by the individual or dependent during the applicable period described by 50 U.S.C. App. Section 516, as that section existed on January 1, 2009. Tex. Prop. Code § 51.015(j) (which is described as the period beginning on the date of the Military Servicemember's receipt of an order to report for Active Duty Military Service and ending on the date on which the Military Servicemember reports for Active Duty Military Service or, if such order is revoked before the Military Servicemember so reports, then ending on the date on which such order is revoked).

<sup>156</sup> Tex. Prop. Code § 51.015(c). Even if a Military Servicemember does not specifically request relief from a court under Section 51.015 of the Texas Property Code, a court may on its own motion, after conducting a hearing on such motion: (1) stay the proceedings for a period of time as justice and equity require; or (2) adjust the obligations of the contract secured by the lien to preserve the interests of all parties. Tex. Prop. Code § 51.015(c). A court that issues a stay or takes any other action under Section 51.015 of the Texas Property Code regarding the enforcement of an obligation that is subject to such statute may grant a similar stay or take similar action with respect to a surety, guarantor, endorser, accommodation maker, co-maker, or other person who is or may be primarily or secondarily subject to such obligation. Tex. Prop. Code § 51.015(h).

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<sup>157</sup> Tex. Prop. Code § 51.015(f). For purposes of Section 51.015 of the Texas Property Code, a "person" includes a corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity. Tex. Prop. Code § 51.015(a)(4); Tex. Gov't Code § 311.005(2).

<sup>158</sup> Tex. Pen. Code § 12.21.

<sup>159</sup> The point of contact and address for each of the military agencies may be found at <http://www.servicememberscivilreliefact.com/link/points-of-contact.php>.

foreclosure sale occurred and informing the Lot Owner and such lienholders of the right of the Lot Owner and/or any such lienholders to redeem the Lot, or in other words, to get the Lot back.<sup>160</sup> Such post-foreclosure notice of redemption rights must be sent by certified mail, return receipt requested, to: (1) the Lot Owner at his or her last known mailing address, as reflected in the records of the Subdivision Association; (2) each lienholder of record at the address of such lienholder, as reflected in the most recent liens filed of record in the Official Public Records of the county in which the subject Lot is located; and (3) each assignee of a recorded lienholder who has provided proper notice to the Subdivision Association of such assignment.<sup>161</sup> If a recorded lien does not include an address for the lienholder, then the Subdivision Association does not have a duty to provide a post-foreclosure notice of redemption rights to such lienholder.<sup>162</sup>

In addition, within thirty (30) days from the date the Subdivision Association sends such post-foreclosure notice of redemption rights to the Lot Owner and each lienholder of record, the Subdivision Association must record an affidavit in the Official Public Records of the county in which subject Lot is located, stating the date on which such notices were sent and containing a legal description of the subject Lot.<sup>163</sup>

## **XVI. HOMEOWNER'S RIGHT OF REDEMPTION FOLLOWING A FORECLOSURE SALE**

Following a foreclosure sale of a Lot or a Unit, the former owner of the foreclosed Lot or Unit may redeem his or her property from foreclosure under certain limited circumstances. In other words,

the former Lot or Unit Owner may be able to get their home back from whoever purchased it at the foreclosure sale. The procedures for redeeming a foreclosed Lot and Unit differ significantly and are explained separately below.

### **A. Redemption of a Lot Foreclosed by a Subdivision Association**

If a Lot that was sold by foreclosure of a Subdivision Association's Assessment Lien is located in a residential Subdivision Development, the former Lot Owner or a lienholder of record can redeem such foreclosed Lot from the person or entity that purchased it at the foreclosure sale any time within one hundred eighty (180) days from the date the Subdivision Association mails the post-foreclosure notice of redemption rights to the subject Lot Owner and applicable lienholders of record.<sup>164</sup> During this one hundred eighty-day Redemption Period, a person or entity that purchases the Lot at the foreclosure sale may not transfer ownership of such Lot to a person or entity other than a redeeming Lot Owner.<sup>165</sup> The procedures for redemption of a foreclosed Lot by the former Lot Owner or a lienholder will depend on whether the foreclosed Lot was purchased at the

<sup>160</sup> Tex. Prop. Code § 209.010(a), (d). For purposes of sending such post-foreclosure notice of redemption rights to lienholders of record, the term "lienholder of record" means a holder of a lien attached to the subject Lot that may be foreclosed by non-judicial foreclosure, such as a Deed of Trust lien. *See* Tex. Prop. Code § 209.010(b)(2).

<sup>161</sup> Tex. Prop. Code § 209.010(b). In order to constitute a proper notice of assignment, the notice must be in writing, contain the mailing address of the assignee, and be mailed by certified mail, return receipt requested, or by United States mail, with signature confirmation, to the Subdivision Association at the mailing address specified in the most recent Management Certificate filed of record in the Official Public Records of the county in which the Subdivision Development is located. Tex. Prop. Code § 209.010(b)(3). In addition, for purposes of providing notice to the lienholders of record, the Lot Owner is deemed by law to have given approval to the Subdivision Association to notify such lienholders. Tex. Prop. Code § 209.010(b-2).

<sup>162</sup> Tex. Prop. Code § 209.010(b-1).

<sup>163</sup> Tex. Prop. Code § 209.010(c).

<sup>164</sup> Tex. Prop. Code § 209.011(b). The term "lienholder of record" means a holder of a lien attached to the subject Lot that may be foreclosed by non-judicial foreclosure, such as a Deed of Trust lien. *See* Tex. Prop. Code § 209.010(b)(2). A lienholder of record, however, may not redeem an applicable Lot within the first ninety (90) days of such one hundred eighty-day Redemption Period and may only redeem such Lot if the Lot Owner has not already redeemed it. Tex. Prop. Code § 209.011(b). It is also important to note, if a redeeming Lot Owner or lienholder sends a written request to redeem an applicable Lot by certified mail, return receipt requested, to the person or entity that purchased the Lot at the foreclosure sale on or before the last day of the one hundred eighty-day Redemption Period, the Lot Owner's or lienholder's right of redemption is extended until the tenth (10th) day after the date the Subdivision Association or other person or entity that purchased the Lot provides written notice to the Redeeming Lot Owner or lienholder of the amounts that must be paid to redeem the Lot. Tex. Prop. Code § 209.011(m).

<sup>165</sup> Tex. Prop. Code § 209.011(c). The person or entity that purchases the Lot at the foreclosure sale can, however, take possession of and occupy the Lot during the one hundred eighty-day Redemption Period, and even lease the Lot to a third-person and collect rents during such period. Notwithstanding, unless the occupants of a foreclosed Lot voluntarily vacate such Lot, the Subdivision Association or other person or entity who purchases an occupied Lot at a foreclosure sale of a Subdivision Association's Assessment Lien must commence and prosecute an eviction lawsuit against the occupants of such Lot in order to recover possession of such Lot. Tex. Prop. Code § 209.011(a). In addition, any lease of a foreclosed Lot during the one hundred eighty-day Redemption Period is subject to the right of redemption by the Lot Owner or an applicable lienholder and the redeeming Lot Owner's right to reoccupy the Lot immediately after the Lot has been properly redeemed. Tex. Prop. Code § 209.011(k).

foreclosure sale by the Subdivision Association or by a person or entity other than the Subdivision Association.

*Redemption Procedures if a Foreclosed Lot is Purchased at the Foreclosure Sale by the Subdivision Association*

If the Subdivision Association purchases the Lot at the foreclosure sale, in order to redeem the foreclosed Lot, a redeeming Lot Owner or lienholder must pay the Subdivision Association:

- (1) all amounts due the Subdivision Association at the time of the foreclosure sale;<sup>166</sup>
- (2) interest on all amounts owed the Subdivision Association, from the date of the foreclosure sale to the date of redemption, at the rate stated in the Subdivision Association's Declaration for delinquent Assessments or, if no interest rate is stated, at an annual interest rate of ten percent (10%);<sup>167</sup>
- (3) the costs incurred by the Subdivision Association in foreclosing its Assessment Lien and conveying the foreclosed Lot back to the Lot Owner upon redemption, including reasonable attorneys fees;<sup>168</sup>
- (4) any Assessments levied against the foreclosed Lot by the Subdivision Association after the date of the foreclosure sale;<sup>169</sup>
- (5) any reasonable costs incurred by the Subdivision Association during its ownership of such foreclosed Lot, including mortgage payments, costs of repair and maintenance of such Lot, and any costs incurred in leasing such foreclosed Lot;<sup>170</sup> and
- (6) the purchase price paid by the Subdivision Association at the foreclosure sale, less any amounts due the Subdivision Association at the time of the foreclosure sale that were satisfied out of the foreclosure sale proceeds.<sup>171</sup>

If the Subdivision Association leases the foreclosed Lot, or otherwise generates income from the use of the foreclosed Lot, during the Redemption

Period and the foreclosed Lot is subsequently redeemed, all rents and other income collected by the Subdivision Association from the date of the foreclosure sale until the date of redemption belong to the Subdivision Association, but the amount of such rents and income must be credited against the amounts that must be paid to the Subdivision Association in order to redeem the foreclosed Lot.<sup>172</sup> In addition, if the former Lot Owner makes partial payment of the amounts due the Subdivision Association at any time prior to the expiration of the one hundred eighty-day Redemption Period, but fails to pay all amounts necessary to redeem the foreclosed Lot before the one hundred eighty-day Redemption Period expires, the Subdivision Association must refund any partial payments back to the former Lot Owner.<sup>173</sup>

If a redeeming Lot Owner or lienholder pays the Subdivision Association all of the required amounts prior to the expiration of the one hundred eighty-day Redemption Period, the Subdivision Association must immediately execute and deliver to the redeeming party a deed transferring ownership of the foreclosed Lot back to the former Lot Owner.<sup>174</sup> If the Subdivision Association fails to do so, the redeeming Lot Owner or lienholder may file a cause of action against the Subdivision Association to compel the Subdivision Association to convey the foreclosed Lot back to the former Lot Owner.<sup>175</sup> In such event, if the redeeming Lot Owner or lienholder is the prevailing party, he or she may also recover his or her reasonable attorneys fees from the Subdivision Association.<sup>176</sup>

If the former Lot Owner and applicable lienholders fail to redeem the foreclosed Lot within the one hundred eighty-day Redemption Period, or before any extended Redemption Period expires, the Subdivision Association is required to record an affidavit in the Official Public Records of the county in which the foreclosed Lot is located stating that the former Lot Owner and applicable lienholders, if any, did not redeem the foreclosed Lot during the Redemption Period or any extended Redemption

<sup>166</sup> Tex. Prop. Code § 209.011(d)(1).

<sup>167</sup> Tex. Prop. Code § 209.011(d)(2).

<sup>168</sup> Tex. Prop. Code § 209.011(d)(3).

<sup>169</sup> Tex. Prop. Code § 209.011(d)(4).

<sup>170</sup> Tex. Prop. Code § 209.011(d)(5).

<sup>171</sup> Tex. Prop. Code § 209.011(d)(6).

<sup>172</sup> Tex. Prop. Code § 209.011(i). In addition, if there is any remaining amount of rent or other income after applying it to the amounts to be paid the Subdivision Association, such surplus must be refunded to the Lot Owner. Tex. Prop. Code § 209.011(i).

<sup>173</sup> Tex. Prop. Code § 209.011(l). The refunded partial payments must be mailed to the Lot Owner at his or her last known address as shown in the Subdivision Association's records within thirty (30) days of the expiration date of the one hundred eighty-day Redemption Period. Tex. Prop. Code § 209.011(l).

<sup>174</sup> Tex. Prop. Code § 209.011(f).

<sup>175</sup> Tex. Prop. Code § 209.011(f).

<sup>176</sup> Tex. Prop. Code § 209.011(f).

Period.<sup>177</sup> A Subdivision Association that purchases a Lot at the foreclosure sale (and any person or entity that subsequently purchases the foreclosed Lot from the Subdivision Association) may presume conclusively that the former Lot Owner and all applicable lienholders did not redeem the foreclosed Lot unless the former Lot Owner or any applicable lienholder files in the Official Public Records of the county in which the foreclosed Lot is located either: (1) a deed from the Subdivision Association conveying ownership of the foreclosed Lot back to the redeeming Lot Owner; or (2) an affidavit that states the foreclosed Lot has been redeemed, contains a legal description of the foreclosed Lot, and includes the name and mailing address of the person who redeemed the foreclosed Lot.<sup>178</sup> If the former Lot Owner or any applicable lienholder fails to either record a redemption deed from the Subdivision Association or an affidavit stating that the foreclosed Lot has been redeemed before the expiration of the one hundred eighty-day Redemption Period, the former Lot Owner's and lienholders' right of redemption as against a subsequent purchaser or lender expires after the expiration of such one hundred eighty-day Redemption Period.<sup>179</sup>

*Redemption Procedures if a Foreclosed Lot is Purchased at the Foreclosure Sale by a Person or Entity other than the Subdivision Association*

If a Lot is purchased at the foreclosure sale by a person or entity other than the Subdivision Association, the redemption requirements of the redeeming Lot Owner or lienholder differ slightly. In order to redeem a foreclosed Lot purchased by a person or entity other than the Subdivision Association, the former Lot Owner or lienholder must still pay the Subdivision Association:

- (1) all amounts due the Subdivision Association at the time of the foreclosure sale, less the foreclosure sales price received by the Subdivision Association from the person or entity that purchased the foreclosed Lot;<sup>180</sup>
- (2) interest on all amounts owed the Subdivision Association, from the date of the foreclosure sale through the date of redemption, at the rate stated in the Declaration for delinquent Assessments or, if no rate is stated in the

Declaration, at an annual interest rate of ten percent (10%);<sup>181</sup>

- (3) all costs incurred by the Subdivision Association in foreclosing its Assessment Lien and conveying the foreclosed Lot back to the redeeming Lot Owner, including reasonable attorneys fees;<sup>182</sup>
- (4) any unpaid Assessments levied against the foreclosed Lot by the Subdivision Association after the date of the foreclosure sale;<sup>183</sup> and
- (5) any taxable court costs incurred in an eviction proceeding brought by the Subdivision Association to acquire possession of the foreclosed Lot prior to redemption.<sup>184</sup>

In addition, the Lot Owner must also pay to the person or entity that purchased the foreclosed Lot at the foreclosure sale:

- (1) any Assessments levied against the foreclosed Lot by the Subdivision Association after the date of the foreclosure sale that were paid by the person or entity to the Subdivision Association;<sup>185</sup>
- (2) the purchase price paid by the person or entity that purchased the foreclosed Lot at the foreclosure sale;<sup>186</sup>
- (3) the amount of any fees incurred for recording the deed conveying ownership of the foreclosed Lot back to the redeeming Lot Owner;<sup>187</sup>
- (4) the amount of any ad valorem property taxes, penalties, and interest paid by such person or entity on the foreclosed Lot after the date of the foreclosure sale;<sup>188</sup> and
- (5) any taxable court costs incurred in an eviction proceeding brought by the person or entity that purchased the foreclosed Lot at foreclosure to acquire possession of the foreclosed Lot prior to redemption.<sup>189</sup>

<sup>177</sup> Tex. Prop. Code § 209.011(n).

<sup>178</sup> Tex. Prop. Code § 209.011(h).

<sup>179</sup> Tex. Prop. Code § 209.011(g).

<sup>180</sup> Tex. Prop. Code § 209.011(e)(1)(A).

<sup>181</sup> Tex. Prop. Code § 209.011(e)(1)(B).

<sup>182</sup> Tex. Prop. Code § 209.011(e)(1)(C).

<sup>183</sup> Tex. Prop. Code § 209.011(e)(1)(D).

<sup>184</sup> Tex. Prop. Code § 209.011(e)(1)(E).

<sup>185</sup> Tex. Prop. Code § 209.011(e)(2)(A).

<sup>186</sup> Tex. Prop. Code § 209.011(e)(2)(B).

<sup>187</sup> Tex. Prop. Code § 209.011(e)(2)(C).

<sup>188</sup> Tex. Prop. Code § 209.011(e)(2)(D).

<sup>189</sup> Tex. Prop. Code § 209.011(e)(2)(E).

Similar to Subdivision Associations, if the person or entity that purchased the foreclosed Lot leases it, or otherwise generates income from the use of the foreclosed Lot, during the Redemption Period and the foreclosed Lot is subsequently redeemed, all rents and other income collected by such person or entity from the date of the foreclosure sale until the date of redemption belong to such person or entity, but the amount of such rents and income must be credited against the amounts that must be paid to such person or entity in order to redeem the foreclosed Lot.<sup>190</sup> Unlike Subdivision Associations, however, if the person or entity who purchased the Lot at foreclosure receives any partial payments of the amount due to redeem the foreclosed Lot from the former Lot Owner prior to the expiration of the one hundred eighty-day Redemption Period, but does not receive all amounts necessary to redeem the foreclosed Lot before the one hundred eighty-day Redemption Period expires, such person or entity has no duty to refund the partial payments it received back to the former Lot Owner.<sup>191</sup>

If a redeeming Lot Owner or lienholder pays the person or entity that purchased the foreclosed Lot all of the required amounts prior to the expiration of the one hundred eighty-day Redemption Period, such person or entity must immediately execute and deliver to the redeeming party a deed transferring ownership of the foreclosed Lot back to the former Lot Owner.<sup>192</sup> If the person or entity that purchased the foreclosed Lot fails to immediately execute and deliver to the

redeeming party a deed transferring ownership of the foreclosed Lot back to the former Lot Owner upon completion of the redemption requirements, the redeeming Lot Owner or lienholder may file a cause of action against such person or entity to compel such person or entity to convey the foreclosed Lot back to the former Lot Owner. In such event, if the redeeming Lot Owner or lienholder is the prevailing party, he or she may also recover his or her reasonable attorneys fees from such person or entity.<sup>193</sup>

If the former Lot Owner and all applicable lienholders fail to redeem the foreclosed Lot within the one hundred eighty-day Redemption Period or before any extended Redemption Period expires, the person or entity that purchased the Lot at the foreclosure sale is required to record an affidavit in the Official Public Records of the county in which the foreclosed Lot is located stating that the former Lot Owner and applicable lienholders, if any, did not redeem the foreclosed Lot during the Redemption Period or any extended Redemption Period.<sup>194</sup> The person or entity that purchased the Lot at the foreclosure sale (and any person or entity that subsequently purchases the foreclosed Lot from such person or entity) may presume conclusively that the former Lot Owner and lienholders did not redeem the foreclosed Lot unless the former Lot Owner or redeeming lienholder files in the Official Public Records of the county in which the Lot is located either: (1) a deed from the person or entity that purchased the foreclosed Lot at the foreclosure sale conveying ownership of the foreclosed Lot back to the former Lot Owner; or (2) an affidavit that states the foreclosed Lot has been redeemed, contains a legal description of the foreclosed Lot, and includes the name and mailing address of the person who redeemed the foreclosed Lot.<sup>195</sup> If the redeeming Lot Owner or lienholder fails to record either the redemption deed from the person or entity that purchased the Lot at the foreclosure sale or fails to record an affidavit stating that the foreclosed Lot has been redeemed before the expiration of the one hundred eighty-day Redemption Period, the former Lot Owner's and lienholders' right of redemption as against a subsequent purchaser or lender expires after the expiration of such one hundred eighty-day Redemption Period.<sup>196</sup>

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<sup>190</sup> Tex. Prop. Code § 209.011(i). If there are remaining excess amounts, they shall be refunded to the Lot Owner. Tex. Prop. Code § 209.011(i).

<sup>191</sup> Tex. Prop. Code § 209.011(l). On the other hand, if a Subdivision Association receives any partial payments from a redeeming Lot Owner prior to the expiration of the one hundred eighty-day Redemption Period, but who fails to pay all amounts necessary to redeem the Lot before the one hundred eighty-day Redemption Period expires, the Subdivision Association must refund any partial payments it received back to the Lot Owner. Tex. Prop. Code § 209.011(l).

<sup>192</sup> Tex. Prop. Code § 209.011(f). Before executing a deed transferring the Lot back to the Lot Owner, the person or entity that purchased the Lot is required to obtain an affidavit from the Subdivision Association or its authorized agent stating that all amounts owed to the Subdivision Association that must be paid by the redeeming Lot Owner or lienholder to redeem the Lot have been paid. Tex. Prop. Code § 209.011(j). The failure of the person or entity that purchased the Lot to comply with this requirement will not affect the validity of redemption. Tex. Prop. Code § 209.011(j). In addition, if all amounts owed a Subdivision Association in order to redeem a foreclosed Lot have been paid, the Subdivision Association is required to provide the person or entity that purchased the Lot with an affidavit stating that such amounts have been paid no later than the tenth (10th) day after the date the Subdivision Association receives all such amounts from the redeeming Lot Owner or lienholder. Tex. Prop. Code § 209.011(j).

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<sup>193</sup> Tex. Prop. Code § 209.011(f).

<sup>194</sup> Tex. Prop. Code § 209.011(n).

<sup>195</sup> Tex. Prop. Code § 209.011(h).

<sup>196</sup> Tex. Prop. Code § 209.011(g).

**B. Redemption of a Unit Foreclosed by a Condominium Association**

The redemption procedures for a foreclosed Unit differ significantly from that of a foreclosed Lot. The most significant difference is that the right to redeem a foreclosed Unit only applies if the Unit is used for residential purposes and only if the Condominium Association purchases such Unit at the foreclosure sale.<sup>197</sup> In other words, if a Unit is used for non-residential purposes or is purchased at the foreclosure sale by a person or entity other than the Condominium Association, no right of redemption exists.<sup>198</sup> In addition, the right of redemption of a foreclosed Unit may only be exercised by the former Unit Owner, not lienholders.<sup>199</sup> Moreover, a Condominium Association is not required to send a Unit Owner a post-foreclosure notice advising such Unit Owner of his or her redemption rights.<sup>200</sup>

If a Unit that is used for residential purposes is purchased by a Condominium Association at a foreclosure sale of the Condominium Association's Assessment Lien, the former Unit Owner may redeem the foreclosed Unit from the Condominium Association any time before the expiration of ninety (90) days after the date of the foreclosure sale.<sup>201</sup> During this ninety-day Redemption Period, the Condominium Association may not transfer ownership of the foreclosed Unit to any person other than a redeeming owner of such Unit.<sup>202</sup> The exercise of the right of redemption, however, is not effective against a subsequent purchaser or lender for value without notice of a redemption of such foreclosed Unit after the ninety-day Redemption Period expires, unless the redeeming Unit Owner records a redemption deed from the Condominium Association or an affidavit stating that the former Unit Owner has exercised his or her right of redemption of the foreclosed Unit in the local Official Public Records.<sup>203</sup>

To redeem a foreclosed Unit, the former Unit Owner must pay to the Condominium Association: (1) all amounts due the Condominium Association at the time of the foreclosure sale; (2) interest from the date of the foreclosure sale to the date of redemption at the rate provided by the Condominium Declaration for delinquent Assessments; (3) reasonable attorneys fees and costs incurred by the Condominium Association

in foreclosing its Assessment Lien; (4) any Assessments levied against the foreclosed Unit by the Condominium Association after the foreclosure sale; and (5) any reasonable cost incurred by the Condominium Association as owner of the foreclosed Unit, including costs of maintenance and leasing.<sup>204</sup> All rents and other income collected from the foreclosed Unit by the Condominium Association from the date of the foreclosure sale until the date of redemption belong to the Condominium Association, but the amount of such rents and income must be credited against the amounts owed by the former Unit Owner in order to redeem the foreclosed Unit.<sup>205</sup> Upon payment of such required amounts, the Condominium Association is required to execute a deed conveying ownership of the foreclosed Unit back to the redeeming Unit Owner.<sup>206</sup>

**XVII. PAYMENT OF DELINQUENT ASSESSMENTS AFTER RECORDING OF NOTICE OF ASSESSMENT LIEN**

Often after recording a Notice of Assessment Lien in the Official Public Records, a delinquent Homeowner will pay the delinquent amounts owed to the Homeowners Association and demand that the Homeowners Association "release its lien." This is particularly true if the payoff of the delinquent assessments is done in conjunction with a closing on the sale of the subject Lot or Unit. Homeowners Associations, however, cannot simply "release" their lien. This is because an Assessment Lien is created by the recording of the Declaration and remains attached to the subject Lot or Unit whether assessments are outstanding or not. In fact, it would require an amendment of the Declaration to actually release the Assessment Lien attached to a Lot or Unit. Instead, Homeowners Associations should record a "Release of a Notice of Assessment Lien" or a "Notice of Payment" which states in so many words that the outstanding amounts owed by the owner of the Lot or Unit to the Homeowners Association, as evidenced by the Notice of Assessment Lien previously recorded have now been paid and that such previously recorded Notice of Assessment Lien is rescinded.

<sup>197</sup> Tex. Prop. Code § 82.113(g).

<sup>198</sup> Tex. Prop. Code § 82.113(g).

<sup>199</sup> Tex. Prop. Code § 82.113(g).

<sup>200</sup> Tex. Prop. Code § 82.113(g).

<sup>201</sup> Tex. Prop. Code § 82.113(g).

<sup>202</sup> Tex. Prop. Code § 82.113(g).

<sup>203</sup> Tex. Prop. Code § 82.113(g).

<sup>204</sup> Tex. Prop. Code § 82.113(g).

<sup>205</sup> Tex. Prop. Code § 82.113(g).

<sup>206</sup> Tex. Prop. Code § 82.113(g).

## **XVIII. KICKING THE WHEELS ON THE NEW EXPEDITED JUDICIAL PROCEDURES REQUIRED FOR NON-JUDICIAL FORECLOSURE OF A SUBDIVISION ASSOCIATION'S ASSESSMENT LIEN: WHAT IT DOES AND DOESN'T DO**

The enactment of Section 209.0092 of the Texas Property Code was an attempt by the Texas Legislature to reach a compromise between reform proponents demanding an outright prohibition on non-judicial foreclosures of Assessments Liens by Homeowners Associations and reform opponents that opposed any restraint on Homeowners Association's contractual rights to do so. While Section 209.0092 does create new pre-foreclosure due process procedures, it does not apply to all Homeowners Associations, nor does it apply to all Assessments Liens. In addition, it creates other practical issues with both its interpretation and its application. Although it is still too early to identify all of the possible issues related to this new procedure, here is what we know after kicking its tires.

### **A. The Expedited Judicial Proceeding Under Section 209.0092 Doesn't Apply to a Condominium Association**

Though reform proponents wanted across the board prohibitions on non-judicial foreclosures of Assessment Liens, Section 209.0092 does not apply to all Texas Homeowners Associations. By its express terms Chapter 209 of the Texas Property Code, including Section 209.0092, is inapplicable to Condominium Developments. Thus, Condominium Associations retain the right to non-judicially foreclose their Assessment Liens without prior court order, while Subdivision Associations must now obtain judicial authorization before they may foreclose an Assessment Lien by non-judicial foreclosure procedures.

### **B. Section 209.0092 Doesn't Prohibit a Subdivision Association from Non-Judicially Foreclosing Its Assessment Lien**

Soon after the enactment of Section 209.0092 of the Texas Property Code there were many commentators in the media that pronounced the death of non-judicial foreclosures of Assessment Liens in Texas at least by Subdivision Associations. Such proclamation was based somewhat on the title of Section 209.0092, which states "Judicial Foreclosure Required." As Mark Twain once penned, however, the news of such death has been greatly exaggerated.

Despite its title, Section 209.0092 does not require all Subdivision Associations to now foreclose an Assessment Lien by judicial foreclosure

procedures. Rather, Section 209.0092 states only that a Subdivision Association may not foreclose an Assessment Lien unless it first obtains a court order in an application for expedited foreclosure under rules to be adopted by the Texas Supreme Court that were to be modeled after the procedures previously adopted for obtaining judicial authorization to non-judicially foreclose liens securing home equity loans.<sup>207</sup> Instead of adopting new rules for an expedited judicial procedure applicable only to the foreclosure of Assessment Liens, however, the Texas Supreme Court amended Texas Rules of Civil Procedure 735 and 736 to make Assessment Lien foreclosures subject to the same expedited judicial procedures applicable to liens securing home equity loans.<sup>208</sup>

An expedited judicial proceeding under Texas Rules of Civil Procedure 735 and 736 is not the equivalent of a judicial foreclosure lawsuit. In an expedited judicial proceeding under Rules 735 and 736 no discovery may be conducted, evidence may be presented by filed affidavits and a final order by the court may not be appealed. More importantly, an order rendered in an expedited judicial proceeding under Rules 735 and 736 does not constitute an order of sale to a sheriff or constable, rather it only authorizes the applicant to proceed with the foreclosure process under applicable law and the terms of the lien sought to be foreclosed.<sup>209</sup> In other words, obtaining an order in an expedited judicial proceeding under Section 209.0092 is not a new type of judicial foreclosure process but is only a new pre-foreclosure process that must be completed before a Subdivision Association forecloses its Assessment Lien pursuant to the same non-judicial foreclosure procedures that applied to Subdivision Associations prior to 2011.

### **C. An Expedited Judicial Proceeding Under Section 209.0092 May Not Be Utilized in Lieu of a Traditional Lien Foreclosure Lawsuit**

One point of confusion and/or contention among some practitioners is whether the expedited judicial procedures established by the Texas Supreme Court in accordance with Section 209.0092 may be utilized by Subdivision Associations who do not have authority under their Declaration or other Dedicatory Instruments to non-judicially foreclose an Assessment Lien. In other words, if a Subdivision Association

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<sup>207</sup> Tex. Prop. Code § 209.0092. Prior to 2011, Texas Rules of Civil Procedure 735 and 736 governed expedited judicial procedures for obtaining a court order to non-judicially foreclose a lien securing a home equity loan.

<sup>208</sup> Tex. R. Civ. P. 735, 736.

<sup>209</sup> Tex. R. Civ. P. 735, 736.9.

does not have express authority to foreclose its Assessment Lien by non-judicial foreclosure procedures, and thus would normally have to foreclose its Assessment Lien by judicial foreclosure procedures, can it elect to utilize the expedited judicial procedures under Texas Rules of Civil Procedure 735 and 736 to foreclose its Assessment Lien instead of filing a traditional lien foreclosure lawsuit? Section 209.0092 suggests the answer is yes, but the Texas Supreme Court has said no.

By its express language, Section 209.0092 states that a “property owners’ association may use the procedures described by this subsection to foreclose any lien described by the association’s dedicatory instruments.”<sup>210</sup> Such a broad description of applicable liens would necessarily include not only Assessment Liens that a Subdivision Association has been authorized to foreclose non-judicially by the express granting of a power of sale, but also Assessment Liens that must be foreclosed judicially because the Subdivision Association is not vested with a power of sale over its applicable Lots. Thus, if one were to read the language of Section 209.0092 literally, he or she would reasonably conclude that a Subdivision Association could opt to utilize the expedited judicial procedures described by Section 209.0092 to judicially foreclose an Assessment Lien instead of filing a traditional lien foreclosure lawsuit.

The problem is that Section 209.0092 does not actually vest a Subdivision Association with a power of sale over its lots, nor does it give a Subdivision Association the power to appoint a trustee to exercise such power of sale.<sup>211</sup> Without an express grant of a power of sale over its Lots, a Subdivision Association has no authority to conduct a non-judicial foreclosure sale of a Lot subject to its Assessment Lien by privately-appointed trustee and may only foreclose its Assessment Lien pursuant to an order of sale rendered by a court.<sup>212</sup> Since an order granted by a court in an expedited judicial proceeding under Texas Rules of Civil Procedure 735 and 736 does not operate as an order of sale, a Subdivision Association cannot opt to utilize such expedited judicial procedures in lieu of

obtaining an order of sale through a traditional lien foreclosure lawsuit.

In recognition of such distinction, the Texas Supreme Court’s 2011 amendment to Texas Rule of Civil Procedure 735 expressly states that the expedited judicial procedures under Rules 735 and 736 only apply to an Assessment Lien in which the Declaration or other Dedicatory Instrument creates a power of sale in the Subdivision Association.<sup>213</sup> While some commentators have accused the Texas Supreme Court of undermining the legislative intent of Section 209.0092 by limiting the application of the expedited judicial procedures under Rules 735 and 736 in such manner, to have done otherwise would constitute a judicial expansion of a party’s contractual rights by impliedly bestowing upon a Subdivision Association a power of sale that has not been granted to it under Texas law or its Dedicatory Instruments.

#### **D. Requiring Subdivision Associations to Obtain a Prior Court Order Through an Expedited Judicial Proceeding May Substantially Discourage Non-Judicial Foreclosures of Assessment Liens**

While Section 209.0092 does not prohibit Subdivision Associations from foreclosing Assessment Liens by non-judicial foreclosure procedures, it may nonetheless substantially discourage Subdivision Associations from doing so by causing Subdivision Associations to incur attorneys fees that exceed the maximum amount of attorneys fees that are legally recoverable in a non-judicial foreclosure of an Assessment Lien. Section 209.008 of the Texas Property Code imposes a limit on the amount of attorneys fees a Subdivision Association may include in the indebtedness secured by an Assessment Lien if such lien is non-judicially foreclosed by the Subdivision Association. More specifically, if the Declaration of a Subdivision Association allows for non-judicial foreclosure of its Assessment Lien, the amount of attorneys fees that such Subdivision Association may include in the amount of unpaid Assessments and costs of collection

<sup>210</sup> Tex. Prop. Code § 209.0092(a) (emphasis added).

<sup>211</sup> The Texas Uniform Condominium Act, on the other hand, expressly grants Condominium Associations with a power of sale as to each Unit within its development. Tex. Prop. Code § 82.013(d).

<sup>212</sup> *Winters v. Slover*, 151 Tex. 485, 251 S.W.2d 726 (1952) (The power of the trustee to sell the deed for the parties derives wholly from the instrument of trust and a trustee has no power to sell the debtor's property, except as is found in that instrument.); *see also Ford v. Emerich*, 343 S.W.2d 527 (Tex. Civ. App.—Houston 1961, writ refused n.r.e.); *First Federal Sav. and Loan Ass'n v. Sharp*, 347 S.W.2d 337 (Tex. Civ. App.—Dallas 1961, writ ref'd n.r.e.).

<sup>213</sup> Tex. R. Civ. P. 735.1. The recognized distinction between an expedited judicial proceeding under Rules 735 and 736 and a traditional lien foreclosure lawsuit is further illustrated by the comment to the 2011 amendments to such rules, which makes clear that a Subdivision Association that does have a power of sale may still elect to foreclose its Assessment Lien by a traditional lien foreclosure lawsuit instead of the new expedited foreclosure proceeding and that if a Subdivision Association does foreclose its Assessment Lien by a traditional lien foreclosure lawsuit, it is not required to obtain a court order authorizing foreclosure under Texas Rules of Civil Procedure 735 and 736 before filing such a lien foreclosure lawsuit. *See* Comment to 2011 Change to Texas Rules of Civil Procedure 735 and 736.

being sought in the non-judicial foreclosure of its Assessment Lien is limited to the greater of: (1) one-third (1/3) of the amount of all unpaid Assessments and actual costs of collection (excluding attorneys fees) owed by the Lot Owner, plus interest and court costs if interest and/or court costs are permitted to be included in the amount secured by the Assessment Lien pursuant to Texas law or the Subdivision Association's Declaration; or (2) \$2,500.<sup>214</sup> Because very few Homeowners have delinquent assessment accounts that exceed \$7,500 when attorneys fees are excluded from such calculation, in most cases, a Subdivision Association's attorneys fees will be capped at \$2,500 in a non-judicial foreclosure sale of an Assessment Lien.

Even though Section 209.0092 now requires a Subdivision Association to obtain a court order authorizing non-judicial foreclosure of its Assessment Lien before it may non-judicially foreclose such lien, Section 209.008 was not amended to allow for recovery of additional attorneys fees. Since Texas Rules of Civil Procedure 735 and 736 do not authorize a court to award attorneys fees in an expedited judicial proceeding and Section 209.0092 does not exclude attorneys fees incurred in such proceeding from the application of Section 209.008, such attorneys fees must necessarily be included within the \$2,500 cap on the amount of attorneys fees that may be charged against a Lot Owner in a non-judicial foreclosure sale. Although it may be too early to fully assess the impact of Section 209.0092, the increased costs to non-judicially foreclose an Assessment Lien may well discourage some Subdivision Associations from continuing to non-judicially foreclose their Assessment Lien.

## **XIX. LOOKING BEYOND THE LEGAL ASPECTS OF ASSESSMENT LIEN FORECLOSURE**

While it is certainly important to understand the laws governing the establishment and foreclosure of Assessment Liens, as attorneys representing Homeowners Associations it is equally important to understand the practical ramifications of Assessment Lien foreclosure and the advisability of proceeding with foreclosure.

### **A. Portrait of the Typical Assessment Lien Foreclosure Scenario**

In most cases of delinquent Assessment matters, Assessments are not the only debts that have gone unpaid by the Homeowner and he or she is typically in default under their mortgage as well. As a Homeowners' outstanding debts continue to mount, it is not unusual for the Homeowner to stick his or her proverbial head "in the sand." By the time a Homeowners Association has exhausted all pre-foreclosure collection efforts, the amount of delinquent Assessments and collection costs secured by the Assessment Lien have risen to a level that is typically viewed as insurmountable by the delinquent Homeowner. As a result, the percentage of delinquent Homeowners who pay the outstanding amounts owed to the Homeowners Association once it has initiated foreclosure proceedings is less than 50% in the author's experience. Once a Lot or Unit is foreclosed by a Homeowners Association, the likelihood that the Lot or Unit will be redeemed is even less probable because if such Homeowner could not afford to cure the default before the foreclosure, he or she is almost never in a financial position to redeem the Lot or Unit after foreclosure when the cost to do so is significantly higher.

Whether an Assessment Lien is foreclosed by judicial or non-judicial procedures, the most common purchaser of the Lot or Unit is the Homeowners Association itself. This is because very few investors or prospective homeowners are willing to purchase real property foreclosed by a junior lien holder that remains subject to senior liens following such foreclosure. Homeowners Associations, on the other hand, can purchase such Lot or Unit by application of credit against the amount owed to the Homeowners Association that is secured by the Assessment Lien.

Even though a Homeowners Association is authorized to lease an acquired foreclosed Lot or Unit during the Redemption Period, in reality this rarely occurs because of the expense of evicting the former Homeowner and/or making the Lot or Unit ready for tenants. Nor is a Homeowners Association likely to be able to sell the Lot or Unit following expiration of the Redemption Period. In order to sell an acquired foreclosed Lot or Unit, the Homeowners Association must either satisfy the underlying mortgage lien on the Lot or Unit, or must sell the Lot or Unit to a purchaser still subject to the underlying mortgage lien, both of which may prove exceptionally difficult to do. In order to satisfy the underlying mortgage lien, the current holder of the secured note must be identified. Unless the current holder of the secured note has recorded an assignment of the Deed of Trust lien, it can be difficult to actually identify the current note holder. Moreover, even if the Homeowners

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<sup>214</sup> Tex. Prop. Code § 209.008(f). Such limitation on the amount of reimbursable attorneys fees that can be charged against a delinquent Lot Owner, however, only applies in a non-judicial foreclosure sale. It does not prevent a Subdivision Association from recovering or collecting attorneys fees in excess of such limited amount by other collection methods, such as judicial foreclosure of a Subdivision Association's Assessment Lien. Tex. Prop. Code § 209.008(f).

Association does identify the current note holder, the note holder is unlikely to confide any information concerning the amount owed on the note without the consent of the borrower. If the Homeowners Association instead chooses to sell the Lot or Unit without satisfying the underlying mortgage lien, it will invariably discover that its pool of potential purchasers is limited to purchasers who are able to pay cash for the Lot or Unit. This is because a lender is generally unwilling to finance the purchase of real property unless all prior liens attached to the Lot or Unit are satisfied and its lien is in a first lien position.

If a Homeowner is not already in default of his or her mortgage when a Homeowners Association forecloses its Assessment Lien, he or she will assuredly cease all mortgage payments thereafter. In almost all cases where a Lot or Unit is foreclosed by a Homeowners Association and not subsequently redeemed, the holder of the mortgage note will foreclose its senior Deed of Trust Lien against such Lot or Unit. As a result, when a Lot or Unit is foreclosed and acquired by a Homeowners Association, the Homeowners Association will normally not recoup its delinquent Assessments and attorneys fees.

### **B. When should a Homeowners Association Foreclose an Assessment Lien?**

So if a Homeowners Association commonly does not recover its delinquent Assessments and attorneys fees, why do Homeowners Associations even foreclose their Assessment Lien in the first place? In general, there are two primary reasons. First, foreclosure is the final step in the collection process utilized by most Homeowners Association and the act of foreclosure is often the stick Homeowners are threatened with in the collections letters sent by the Homeowners Association, and its property managers and attorneys. If a Homeowners Association has a known policy of not following through on its threat of foreclosure, it will most likely see its delinquencies soar and its collection rate plummet. This is because a real risk of foreclosure serves as an incentive to all Homeowners to keep current in the payment of their Assessments and to try to work out a payment plan when they fall behind.

The second reason Homeowners Associations foreclose their Assessments Liens is purely an economic one. Although foreclosure of its Assessment Lien is not likely to result in recovery of past-due Assessments owed to the Homeowners Association, it will stop the bleeding by causing the Lot or Unit to be acquired by a new owner who will presumably begin paying Assessments. In order to illustrate this point, assume hypothetically that condominium association A levies monthly Assessments of \$150 and has a

policy of not foreclosing its Assessment Lien, and condominium association B also levies monthly Assessments of \$150, but has a policy of foreclosing its Assessment Lien if a Unit owner is \$750 (or five months) or more in arrears. Assume further that condominium association B will foreclose its Assessment Lien non-judicially at a cost of \$2,000 in attorneys fees by the end of the 6<sup>th</sup> month and will purchase such Unit by credit bid at the foreclosure sale. Under such scenario, at the six-month mark, the delinquent Unit owner in condominium association A will have an unpaid balance of \$900 in unpaid assessments and the delinquent Unit owner in condominium association B will have an unpaid balance of \$2,900 in unpaid assessments and collection costs (ie., attorneys fees). Under such short-term scenario, there is an obvious financial downside to condominium association B foreclosing its Assessment Lien. As time goes on, however, the financial downside lessens and eventually becomes a financial benefit to condominium association B.

Continuing with the same hypothetical situation, assume that the Units are both subject to a mortgage, and that the mortgage holder for the Unit in condominium association B forecloses its Deed of Trust Lien on such foreclosed Unit six months later because such unit owner stopped paying his or her mortgage after losing ownership. At the one-year mark, the Unit owner in condominium association A will owe \$1,800 in unpaid assessments. Meanwhile, the Unit owner in condominium association B will still only owe \$2,900, but condominium association B will have absorbed another \$900 in lost assessments while it was the owner of the foreclosed Unit. Thus, at the one-year mark, condominium association A is now out \$1,800 in unpaid assessments and condominium association B is out \$3,800 in unpaid assessments and costs of collection.

Now, assume that following the mortgage holder's foreclosure of the Unit in condominium association B a new owner of such Unit begins paying assessments to condominium association B. Under such scenario, at the two-year mark, condominium association A will now be out \$3,600 in unpaid assessments. While condominium association B will have still absorbed \$3,800 in unpaid assessments and costs of collection, it will have stopped its bleeding and will have received \$1,800 in paid assessments from the new owner of the foreclosed Unit during the second year. Taking into account the assessments paid on such unit following the mortgage holder's foreclosure, the net result is that condominium association B's loss is now approximate \$2,000 compared to condominium association A's loss of \$3,600. If the hypothetical scenario continues, at the three-year mark, condominium association A will be

out \$5,400 in unpaid assessments that it may have to ultimately absorb, while condominium association B's loss of \$3,800 in unpaid assessments and costs of collection has now been mitigated by \$3,600 in paid assessments it has received during such time frame. While this is certainly a simplistic hypothetical, it illustrates the dilemma faced by Homeowners Associations who must determine whether the short-term costs of foreclosing its Assessment Lien will result in long-term benefits that outweigh such short-term costs.

Although Assessment Lien foreclosure is a viable tool in Assessment collection, it may not be appropriate or in the Homeowners Association's best interest in all circumstances. The advisability of foreclosing an Assessment Lien should be made on a case-by-case basis with due consideration given to the amount of unpaid Assessments owed by the Homeowner and amount of time such Assessments have been in arrearage; the existence and amounts of any senior liens attached to the delinquent Homeowner's Lot or Unit; the percentage of Homeowners Association-wide in arrearage; whether the Homeowners Association is authorized to conduct non-judicial foreclosure of the Assessment Lien; the cost of foreclosing the Assessment Lien; and the ability of the Homeowners Association's ability to currently satisfy its operating costs, among other factors.

### **C. Assessment Lien Foreclosure: Good Business or Poor Politics?**

While there are certainly good reasons for a Homeowners Association to pursue foreclosure of its Assessment Lien, Homeowners Associations nationwide, and in Texas, have taken fire for doing so; especially when the amount of delinquent Assessments owed by the Homeowner at the time of foreclosure is very small. And, until recently, no Assessment Lien foreclosure had caused more fallout in Texas than the foreclosure of a home owned by Wenonah Blevins in 2001.

In the Spring of 2001, every major newspaper in the state of Texas publicized the story of Wenonah Blevins, an 82-year-old widow in Harris County, who owned a home valued at \$150,000, free and clear of any mortgage, that was foreclosed on by her Homeowners Association. According to the published articles, Ms. Blevins owed \$814.50 in past-due Assessments to the Champions Community Improvement Association, along with more than \$3,700 in legal fees and penalties associated with collection of such past-due Assessments, when Champions Community Improvement Association foreclosed its Assessment Lien and sold Ms. Blevins

home for \$5,000 to satisfy such unpaid assessments and attorney fees.

The public outcry following publication of Ms. Blevins' story was immediate and strong. As a result thereof, the Texas Legislature immediately enacted Chapter 209 of the Texas Property Code to impose certain due process procedures upon a Subdivision Association before it may foreclose its Assessment Lien and to establish redemption procedures for Lot owners who lose their home due to foreclosure of an Assessment Lien. In fact, the legislative history of Chapter 209 notes that Chapter 209 was "enacted in honor of Wenonah Blevins and may be unofficially referred to as the Wenonah Blevins Residential Property Owners Protection Act."<sup>215</sup>

The perceived egregiousness of the Wenonah Blevins foreclosure continued to have an effect on the legislation filed during each legislative session following 2001, which culminated during the 2011 legislative session, shortly after the media began reporting on two more highly polarizing cases of Assessment Lien foreclosures. On May 12, 2010, WFAA-TV in Dallas/Fort Worth reported on the foreclosure of a home in Burleson, Texas owned by Sherre Mueller.<sup>216</sup> According to media reports, Ms. Mueller owned a home appraised at \$150,000 that she owned free and clear after paying off the mortgage with money she received from a life insurance company after her husband died. Thereafter, Ms. Mueller lost her job and was forced to sell her jewelry and tap her 401K account to help pay bills while she wasn't working. Ms. Mueller also ceased paying her annual \$300 assessment to her Homeowners Association for four years while she was unemployed. In January 2010, the Homeowners Association foreclosed its Assessment Lien on Ms. Mueller's home, selling it to a Dallas company for \$3,100 in order to satisfy the \$1,200 in unpaid assessments and its attorneys fees. Ms. Mueller had until July 6, 2010 to redeem her home from foreclosure and thanks to the publicizing of her plight, WFAA-TV's viewers donated enough money to Ms. Mueller to make it possible for her to afford to do so.

The second and more polarizing of the two foreclosure cases was also reported in May 2010 and involved the foreclosure of a home in Frisco, Texas, owned by Captain Michael Clauer and his wife, while Captain Clauer was deployed as an active-duty soldier to Iraq. According to a May 14, 2010 report by

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<sup>215</sup> Tex. S.B. 507, 77th Leg., R.S. (2001).

<sup>216</sup> <http://www.wfaa.com/news/local/HOA-forecloses-on-Burleson-woman-for--93650764.html>.

WFAA-TV in Dallas/Fort Worth,<sup>217</sup> Captain Clauer and his wife owned their home, valued at \$300,000, free and clear of any mortgage as a result of his wife's parents giving the couple the home as a gift. However, while Captain Clauer was away in Iraq, his wife fell into a depression. As a result of her depression, Captain Clauer's wife allowed the mail to pile up unopened and she failed to pay the assessments or even be aware of the collection letters from the Homeowners Association. By the time Captain Clauer returned from his deployment in Iraq, the Homeowners Association had already foreclosed its Assessment Lien against Captain Clauer's home for unpaid assessments in the amount of \$800, plus attorneys fees, and sold it to a third-party for only \$3,500. In addition, the six-month redemption period under Chapter 209 had already expired before Captain Clauer returned from Iraq; thus, preventing Captain Clauer from being able to simply redeem their home.

The case involving Captain Clauer ultimately became a national news story and was reported by several national news agencies, including the Wall Street Journal and National Public Radio. The public outcry concerning Captain Clauer equaled or exceeded that of Wenonah Blevins and it was reported that several of the individual board members involved in the Clauer foreclosure received death threats from people outraged over the Homeowners Association's actions. Following the reporting of the Mueller and Clauer foreclosures in 2010, and perhaps because of the public outcry concerning such foreclosures, the 2011 Texas Legislature enacted the most significant reform to laws governing Texas Homeowners Associations since the enactment of the Texas Uniform Condominium Act in 1993, including Section 209.0092 of the Texas Property Code.

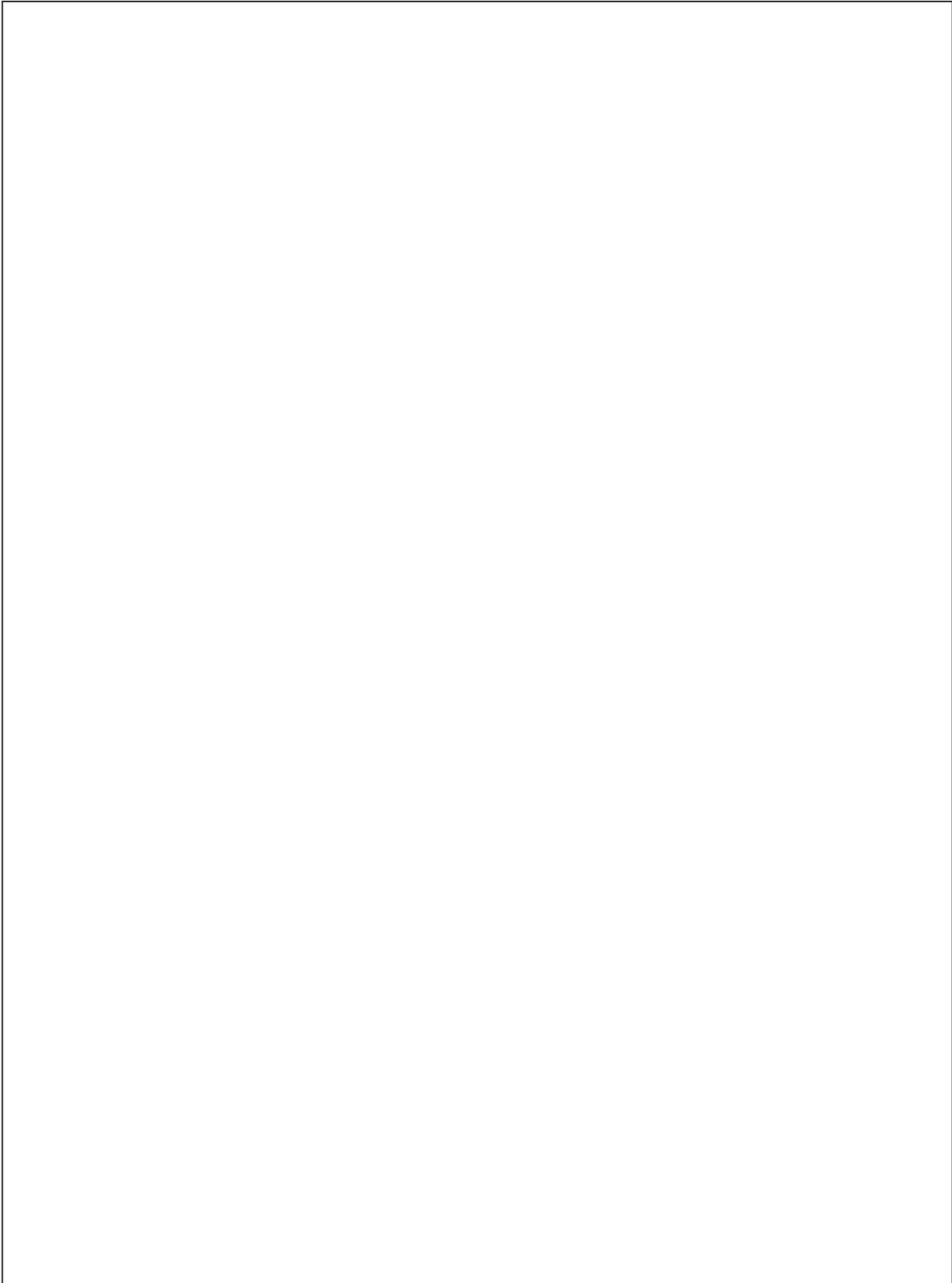
But do the 2011 legislative reforms concerning Assessment Lien foreclosures actually solve any of the problems faced by Texas Homeowners Associations and Homeowners? To answer this question, one need only ask themselves, if the Mueller and Clauer foreclosures had occurred after 2011 and in compliance with the newly created procedures, would the public outcry have been any less? The answer is probably not. The public outcry over the Blevins, Mueller and Clauer foreclosures had more to do with the personal circumstances of the homeowners and modest amounts owed to the Homeowners Associations than whether or not the Homeowners Associations had complied with the required procedures for foreclosing an Assessment Lien.

The unfortunate reality is that the 2011 legislative reforms concerning Assessment Lien foreclosures do not resolve the underlying issues that cause or contribute to most Assessment Lien foreclosures; namely an inability of a homeowner to be financially able to pay Assessments after suffering an economic setback (such as a loss of employment) and a lack of alternative options for Homeowners Associations to secure eventual collection of unpaid Assessments without foreclosing their Assessment Liens. While imposing additional pre-foreclosure due process procedures provides political cover from the public cries for reform and oversight of Homeowners Associations, it will not enable Homeowners who cannot afford to pay their Assessments to suddenly be able to and it will not stop Assessment Lien foreclosures. It will, however, make the foreclosure process longer and more expensive, and in turn will increase the costs of collections incurred by the Subdivision Association, which ultimately must be paid by such Homeowner to avoid foreclosure or to redeem a foreclosed Lot or Unit following foreclosure. Had the Homeowners Association in the Mueller foreclosure obtained a court order through an expedited judicial proceeding under Texas Rules of Civil Procedure 735 and 736 prior to non-judicially foreclosing its Assessment Lien against Ms. Mueller's home, she may very likely have been unable to raise enough money to pay all of the attorneys fees necessary to redeem her Lot.

Rather than focusing solely on imposing restrictions on Homeowners Associations' ability to foreclose their Assessment Liens or making such process more expensive, the Texas Legislature should consider legislation that establishes alternative methods for securing payment of unpaid Assessments without causing an increase in the costs of collection incurred by a Homeowners Association, such as the creation of a super lien in favor of Homeowners Associations as has been done in Colorado, or requiring mortgagees to escrow Assessments and/or extending the statute of limitations for collection of unpaid Assessments so that Homeowners Associations do not have to foreclose an Assessment Lien within four years of the Assessment becoming delinquent. Until the Texas Legislature enacts laws that address the underlying issues that lead to foreclosure of Assessment Liens by Texas Homeowners Associations foreclosures of the likes of Blevins, Mueller and Clauer will continue to occur.

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<sup>217</sup> <http://www.wfaa.com/news/local/Frisco-soldier-comes-home-to-find-home-sold-by-HOA-93829194.html>.



**NOTICE OF ASSESSMENT LIEN AGAINST PROPERTY  
FOR SUMS NOT PAID TO PROPERTY OWNERS ASSOCIATION**

THE STATE OF TEXAS §  
COUNTY OF TRAVIS §

WHEREAS, [Name of Owner(s)] (the "Owner") is the owner of the real property locally known as [Property Address], Austin, Texas \_\_\_\_\_ and legally known as [Legal Description], according to the [Full Name of Applicable Declaration and recording info] (the "Property");

WHEREAS, the Property is subject to the [Full Name of Applicable Declaration, any amendments and all recording info] (the "Declaration");

WHEREAS, pursuant to the Declaration and/or Texas law, the [Name of HOA] Homeowners Association, Inc. (the "Association") has a contractual lien on the Property for unpaid assessments and other sums owed by such Owner to the Association (the "Assessment Lien");

WHEREAS, of the date of this Notice of Assessment Lien, the Owner has failed to pay to the Association certain assessments and other sums due the Association;

NOW THEREFORE, the Association hereby files its Notice of Assessment Lien against the Property, as authorized under the Declaration and/or Texas law.

Total Assessment Delinquency. As of the date of this Notice of Assessment Lien, the amount due and owing to the Association for past-due unpaid assessments, late fees and accrued interest (as applicable), and costs of collection incurred, including attorneys fees, by the Association is \$ \_\_\_\_\_ (the "Assessment Delinquency"). Such amount will accrue interest and costs of collection as provided in the Declaration until paid. Additional amounts assessed against the Property which accrue after the date of this Notice of Assessment Lien and which are not paid shall be automatically added to the Assessment Lien. Moreover, the Association shall not rescind this Notice of Assessment Lien without full payment of the Assessment Delinquency and attorney's fees and recording costs incurred to date, plus any additional delinquent sums and attorney's fees incurred hereafter and reimbursement of recording costs and attorney's fees incurred in preparing and reviewing any necessary documents to effectively rescind this Notice of Assessment Lien as authorized by the Declaration.

\_\_\_\_\_  
**HOMEOWNERS ASSOCIATION,  
INC.**, a Texas non-profit corporation

BY: \_\_\_\_\_  
ITS: President

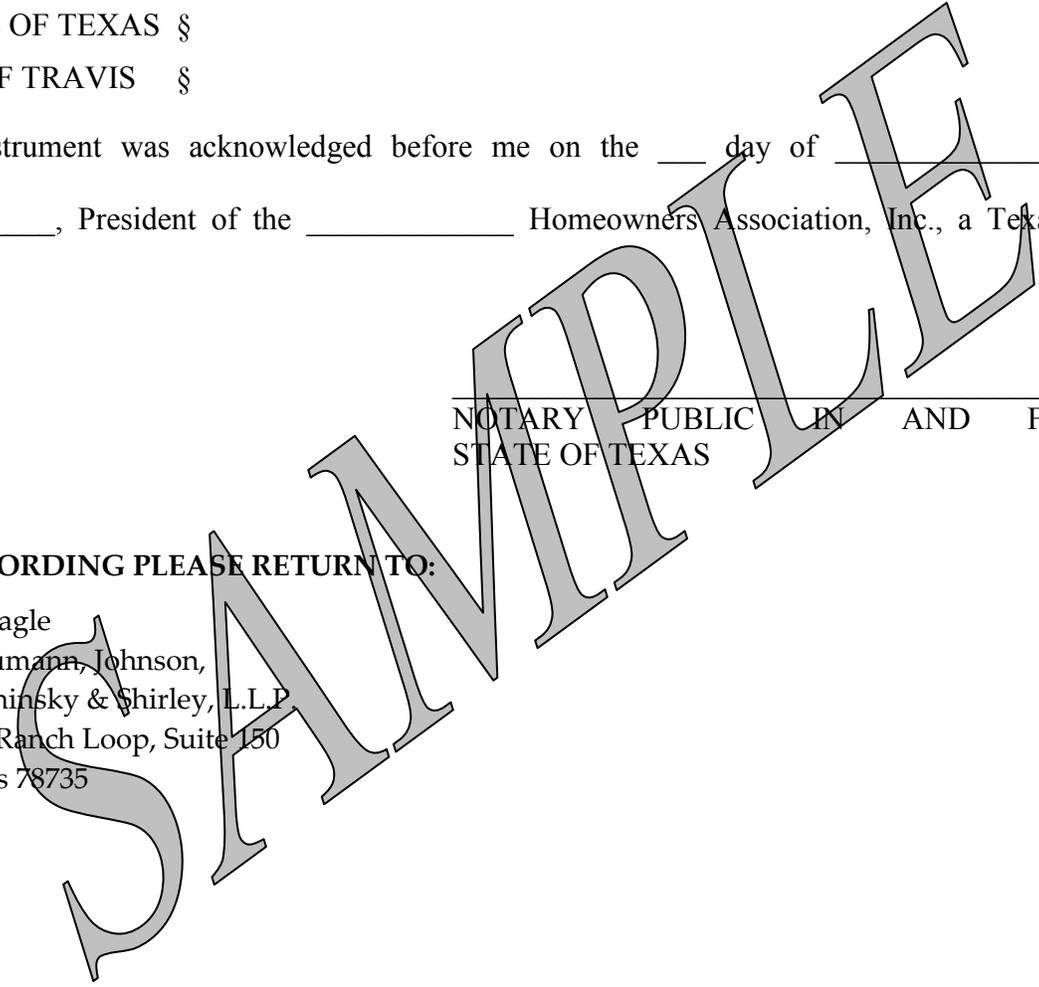
THE STATE OF TEXAS §  
COUNTY OF TRAVIS §

This instrument was acknowledged before me on the \_\_\_ day of \_\_\_\_\_, 2012, by \_\_\_\_\_, President of the \_\_\_\_\_ Homeowners Association, Inc., a Texas non-profit corporation.

\_\_\_\_\_  
NOTARY PUBLIC IN AND FOR THE  
STATE OF TEXAS

**AFTER RECORDING PLEASE RETURN TO:**

Gregory S. Cagle  
Savrck, Schumann, Johnson,  
McGarr, Kaminsky & Shirley, L.L.P.  
4330 Gaines Ranch Loop, Suite 150  
Austin, Texas 78735



**NOTICE OF PAYMENT TO PROPERTY OWNERS ASSOCIATION  
AND RELEASE OF NOTICE OF ASSESSMENT LIEN**

THE STATE OF TEXAS §  
COUNTY OF TRAVIS §

WHEREAS, [Name of Owner(s)] (the "Owner") is/are the owner(s) of that certain real property locally known as [Address], Austin, Texas \_\_\_\_\_ (the "Property") and legally described as:

[Legal Description];

WHEREAS, the Property is subject to the [Declaration, any amendments, and recording information] (the "Declaration");

WHEREAS, pursuant to the Declaration and/or Texas law, the [Name of HOA] Homeowners Association, Inc. (the "Association") has a contractual lien against the Property for unpaid assessments and other sums owed by such Owner to the Association (the "Assessment Lien");

WHEREAS, the Owner had failed to pay certain sums owed to the Association representing unpaid assessments, late fees, accrued interest and costs of collection (as applicable), and as a result thereof, on [date Lien was recorded], the Association recorded that certain Notice of Assessment Lien recorded at Document No. [Doc No. of Lien]; Official Public Records, [County], Texas (the "Notice of Assessment Lien")

WHEREAS, the Owner has now paid all outstanding sums identified in the Notice of Assessment Lien.

NOW THEREFORE, the Association hereby files this Notice of Payment to Property Owners Association and Release of Notice of Assessment Lien (the "Notice of Payment") and hereby releases the Notice of Assessment Lien.

Executed this the \_\_\_\_\_ day of \_\_\_\_\_, 2012.

By: \_\_\_\_\_  
Gregory S. Cagle

THE STATE OF TEXAS §  
COUNTY OF TRAVIS §

This instrument was acknowledged before me on \_\_\_\_\_ day of \_\_\_\_\_, 2012, by Gregory S. Cagle, attorney for [Name of HOA] Homeowners Association, Inc..

\_\_\_\_\_  
Notary Public Signature (seal)

**AFTER RECORDING RETURN TO:**

Gregory S. Cagle  
Savrick, Schumann, Johnson,  
McGarr, Kaminsky & Shirley, L.L.P.  
4330 Gaines Ranch Loop, Suite 150  
Austin, Texas 78735

SAMPLE